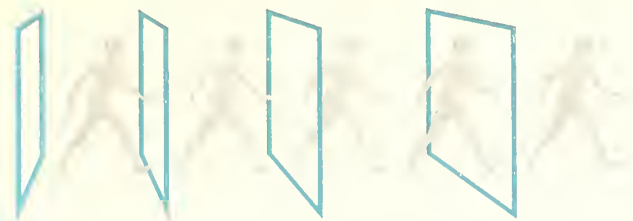


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CONFERENCE OBJECTIVE AND PROCESS

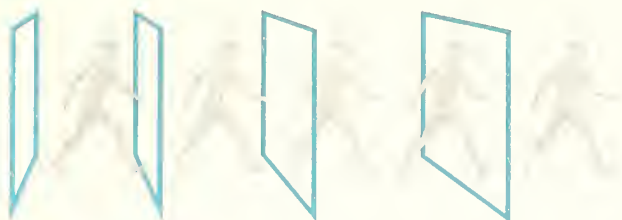
The Conference on Access to Civil Justice represents a significant initiative of the Ontario Ministry of the Attorney General. The conference presents a rare opportunity for the numerous and diverse groups and individuals who administer and who use the civil justice system to debate issues and offer solutions to problems.

Plenary speakers from across the country and abroad have been chosen for their experience and their insight into the issues and the potential solutions. The Ministry of the Attorney General has commissioned research papers from a number of the plenary speakers to provide a common base of information for all delegates and to ensure a high degree, quality and depth of discussion.

The format of the conference is to introduce topics through the plenary sessions and to then address specific issues in the topic areas through the concurrent workshops. The workshops represent the central forum for the presentation, debate, and potential resolution of problems in the civil justice system. They are designed to be hands-on, problem-solving sessions in which you, as a delegate, are urged to play an active role. Your participation will be a vital factor in the achievement of the conference objective. The results of workshop discussions will be summarized and reported to all delegates in plenary the following morning.

At the closing session of the conference, four panelists will discuss themes which have emerged over the course of the conference and will suggest ways of translating these ideas into action.

The relevance and usefulness of this final reporting ultimately depend upon your participation in the workshops throughout the duration of the conference. Your contribution will ensure the successful outcome of this important initiative.



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Lorraine Graham, Audrey Gill and Jean Hoo will be circulating through the meetings. Mary Alice Deverell and Wendy Peterson will be staffing the booth. Bob Wyatt and Beth Boswell are managing media relations.

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Interpretation is provided in all the plenary sessions and in one workshop in each group of workshops. This workshop will be held near the interpretation booth at the back of the Centennial Ballroom.

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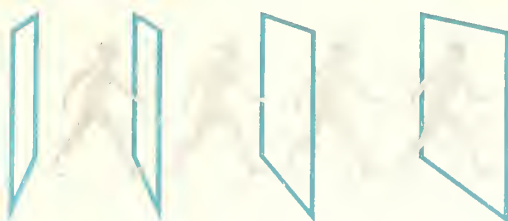
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**Problems and Experience With The
Ontario Civil Justice System:
A Preliminary Report**

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*Prepared for the Conference on Access to Civil Justice of
the Ontario Ministry of the Attorney General, June 1988.

Executive Summary

Purpose

1. An in-depth survey of 3024 Ontario households was undertaken. It was supplemented with a study involving a series of "focus groups" in which people discussed the Ontario civil justice system in the context of their own experience.

2. One purpose of the research was to explore the extent to which the households experienced a number of civil justice problems involving \$1000 or more: torts, consumer problems, debt problems, landlord problems, divorce/separation problems, problems with various levels of government, discrimination, and invasions of privacy.

3. Another purpose was to discover how people responded to these problems: did they ask for compensation, seek legal or extra-legal help, and engage the legal process? The study also gathered information about eventual outcomes and people's satisfaction with them.

4. Other information relating to the civil justice system was also gathered, including responses of persons who did not seek compensation, information about lawyers, and general attitudes about the legal system.

Findings

1. About 1 in 3 Ontario households experienced a serious civil justice problem over the three year period.

2. Rates of seeking compensation varied by the type of problem, as did disputing strategies.

3. The chances of a successful outcome resulting from a claim for compensation as well as satisfaction with that outcome also varied by types of problem.

4. People who did not seek compensation for their problem expressed no less faith in the general justice system than compensation seekers.

5. While some sources have suggested that general attitudes toward lawyers are often negative, the present data indicated that among people who contacted lawyers and among those who did not little animus toward the legal profession was expressed.

6. Levels of general attitudes toward the Ontario legal system are positive, though people tend to feel it is sometimes slow and costly and that other means of dispute resolution should be attempted.

7. Rather than conceive of the civil justice system as a unitary entity, it is more productive to think of it as a mechanism that is called upon differentially by people with different types of problems and which produces different results and rates of satisfaction.

Chapter 1

Introduction

How do people come to the law?

A basic, simple question but one that has been rarely asked and answered in Canada by those who most influence the legal system - lawyers, judges and academics. Study of the law has traditionally focussed upon analysis of appellate court decisions (with sporadic reference to statutory material and output of administrative agencies) as the mirror in which we are to see the face of justice. And from one glance the reflection is clear since it affords an opportunity to examine and criticize the product of the main players, to react to philosophical and tangible expressions of how law's domain should treat the social and political issues that impress themselves upon these framers. But from another it is to see through a glass darkly for appellate court decisions tell us little if anything about how the law actually connects with ordinary people in the everyday lives, how the experiences of men and women are shaped by the law and, in turn, how the law is modified by their activities.

It was this curiosity about the workings of the legal system and its impact which inspired the legal realists and more currently the law and society movement in many countries, including our own.¹ This same questioning has inspired the present research, the preliminary results of which we report in this paper.

One way in which appellate court judgments are assuredly not representative is in numbers. Only a miniscule fraction of lawsuits which are filed ever arrive at a court of appeal. Indeed, only a somewhat larger percentage are concluded by the decision of a trial court. The overwhelming majority are disposed of even before that point.² Beyond this the number of cases filed are an unknown fraction of the number of wrangles and controversies out there that could end up in the courts, transformed into a legal action. Thus, disputing behaviour can be thought of as a large triangle with resolution by trials near the apex and by appellate judgments at the very pinnacle.³ Disputes that have involved formal filings in court, but which settle at various stages before trial, fall immediately below and are far more numerous than trial cases. However, the base from which all of these cases emerge is composed of events that could lead to legal action, but do not: i.e., the injured party does not seek compensation; compensation is sought and granted; compensation is sought but denied by the other party and the claim is then abandoned. These "cases" at the base of the triangle are not readily visible but, of course, they are central in concerns about access to justice.

The purpose of the present study was to examine this base of the triangle. We wanted to determine the extent to which individuals assert basic rights concerning serious problems, and learn what kinds of behaviour they engage in to realize what they believe are their entitlements. To get at this central issue we asked a series of questions: what kinds of serious problems do

people have and in what proportion relative to each other?.. To what extent do individuals actually assert a right of redress? What makes some individuals seek relief and others not? If there is resistance but the dispute is settled, what role do institutions play - courts, government agencies, neighbourhood organizations, etc.? What role do lawyers play in all of these stages? And beyond what individuals do, what are their opinions regarding these various behaviours? How much knowledge of law and legal rights do they believe they have? How fair do they think the legal system is? Would they like alternative methods for resolving disputes? How satisfied are they with the results? What are their reactions to the lawyers who have served them? Do the answers to these questions vary with the type of dispute or with various demographic characteristics? And what do the critical points of comparison tell us about the propensity of Canadians to dispute within and without the formal structures of the law.

These are important questions and, yet, despite the cost of and time and energy consumed by this study it clearly has boundaries which must be kept in mind. In the face of such ignorance concerning how people assert their rights and use the law in Canada, we decided to undertake a general survey of what people report as serious non-criminal problems and what they do about them within the shadow of the law in order to provide a depiction of a large section of disputing behaviour. Such an image emerges along with a general canvassing of some important attitudes toward the justice system.

The results should be of substantial assistance for those

interested in such questions. But it will also be a source of frustration for those with particular interests and issues who will be only tantalized by relevant information that emerges from the general picture of disputing behaviour in Ontario. Lawyers, feminists, those interested in furthering (or opposing) changes in how motor vehicle accident claims are dealt with, native peoples advocates and those studying professional malpractice claims and defences - to conjure up only a limited but diverse list - may very well complain that they should know more. And we hope in time, through further studies, they will. What this study should do, with all its constraints, is to provide a base mapping of the terrain against which questions concerning particular issues and interests can be compared.

As will be described in the next chapter, our research actually consisted of two studies, a survey of over three thousand Ontario households and a series of "focus groups" wherein men and women discussed the Ontario civil justice system in the context of their own experience with problems. The data set from both studies is very large. In the limited time period available to implement the studies and prepare a report for the Access Conference not all of the data could be analyzed. Therefore, despite its length this report only presents the broad outlines of the research and should be considered a preliminary statement of what the research discovered.

Footnotes to Chapter 1

1. Friedman, "The Law and Society Movement" (1986), 38 Stanford Law Review 763; Lempert and Sanders An Invitation to Law and Social Science (1986); and Bogart "Empirical Studies and Procedural Law: The Law, In Fact", Paper presented to the Canadian Law and Society Association, Montreal 31 May 1985.
2. Holman, "Pace and Patterns of Civil Litigation Prior to Placement on the Trial List: An Empirical Study of the Niagara North County Court and Discussion of Ontario's Reformed Rules of Civil Procedure" (1986), 6 Windsor Yearb. Access Justice 194. In her study she found that only 5% of the cases were disposed of at trial (211); Watson, Bogart, Hutchinson and Sharpe Canadian Civil Procedure - Cases and Materials (3rd ed., 1988), 50.
3. Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious Society" (1983), 31 U.C.L.A. Law Review 4, 11-36.

Chapter 2

Methodology

A. Research Strategy and Implementation

We studied the questions sketched in Chapter 1 given both a quantitative and a qualitative perspective. For the quantitative results 3024 interviews were conducted with the head of household. These were conducted by telephone and were obtained through random digit dialing. The questionnaire was designed by the authors and Mr. Jim Peterson of Canada Market Research, the firm which actually carried out these interviews. A questionnaire utilized in a similar study done in the United States was also of considerable assistance.¹

The telephone interview was designed to elicit whether members of the household had had a serious problem within the last three years. In order to eliminate minor problems and to assist the interviewee with the kind of problem we wished to explore, we employed \$1,000 as the threshold amount in issue except in some categories where it might be difficult to put a monetary value on the nature of the problem, such as in discrimination or invasion of privacy problems. The \$1,000 threshold was also consistent with the above-mentioned study conducted in the United States and one conducted in Australia.² To frame the issues 15 categories of problems, listed in the Appendix to this paper, were read to the respondent; an additional final question was asked about any other problems in order to afford the respondent an opportunity to describe other conflict which had been experienced. The question categories

were rotated to guard against the initial categories yielding a higher response rate just because they appeared at the beginning.

If a household had a serious problem we then attempted to discover what, if anything, was done about it. In order to organize and analyze responses, we utilized three concepts: grievance, claim, and dispute.³ A grievance is an individual's belief that he or she is entitled to a resource which someone else may grant or deny. A claim is registered to communicate a sense of entitlement concerning the grievance. A dispute exists when a claim based on a grievance is rejected, either in whole or in part. Finally there is termination: a dispute is terminated when nothing more is being done about it because it has been settled, resolved through a legal proceeding (court or otherwise), or the party with the grievance says it is completed.

These concepts related to the responses of those interviewed as follows. A grievance was isolated when a head of the household or the member responded that they had a serious problem in the last three years. A claim existed when they complained about the problem to someone who could provide redress. A dispute occurred when the interviewee indicated the matter was not resolved or resolved with difficulty. Then, a series of questions was asked to discover if the matter was terminated or ongoing and, if terminated, by what means.

Further, to discover not only what people did but what they thought of what they did and the justice system, we asked two sets of attitudinal questions. A first set of questions asked people with a grievance about the outcome of the grievance.

These concerned level of satisfaction, whether there was too great a delay, whether cost of dealing with the problem was too high and the appropriateness of fees charged by lawyers. A second set was asked of all 3024 respondents, regardless of whether they had a grievance or not. These included such questions as people's knowledge of their rights, whether they considered the system fair, whether they would expect great delay if a problem required legal action, whether they saw themselves as a victim of business or government and whether they believed alternative methods of resolving disputes should be available and employed.

The telephone interviews were meant to provide a snapshot of disputing behaviour in Ontario during the last three years. Telephone interviewing was used because it is comparatively cheap, fast, and frequently results in a more geographically dispersed sample. Yet it has limitations: the limit of endurance in a telephone interview for most people is about thirty minutes and this amount of time was required to ask bare essentials in order to trace the grievance-claiming-disputing path when there was a problem. Thus, to obtain a more complete picture of how people make choices concerning problems that may become legal issues and how they react to the legal system and its actors we conducted a series of focus groups. About forty individuals who had participated in the telephone survey, who had had problems, and who had indicated they would be willing to participate further were re-contacted and asked to participate in a small group discussion concerning the problems and the justice

process. These people were interviewed in focus groups of three to six persons for approximately seventy to ninety minutes. They were questioned about their problems, what they did about them, their satisfaction and dissatisfaction with the results, and their attitudes to the legal system and its actors. The authors observed the groups behind a one-way mirror and audio tapes were made of the sessions.

B. Limitations of the Methodology

There are limitations of the methodology that was utilized. These need to be discussed. However, the critical point is not just to identify the constraints but also judge them against other methods of obtaining information in terms of cost, time, accuracy and feasibility. In our judgment the methods employed were the best given the critical trade-offs necessitated by time and cost against an attempt to gain an overall sense of disputing behaviour in the province.

To begin with an obvious point, the study was conducted exclusively in Ontario. Therefore we make no claims to depicting behaviour beyond these borders. Whether there are factors in other provinces or territories which would alter significantly what is portrayed here we are not prepared to say.

There are a number of qualifications to the telephone survey which need to be taken into account. First, it clearly excludes those without a telephone or access to a telephone (such as in some rooming houses). Overwhelmingly, households in Ontario do have a telephone.⁴ Clearly, however, individuals in institutions, hostels, or on the streets have been excluded. The mar-

ginals, the weakest among us then, have not been fully taken into account.

Second, the study focussed on civil problems of households. The study says nothing about problems of a criminal nature nor about problems of groups, organizations or other collectivities, nor about the disputing behaviour of business, government, trade unions or other entities. All these other entities could and should be studied. We focussed on households with civil problems as the starting point since issues concerning them appear repeatedly in the literature on access to justice.⁵ Their claim to attention seems at least as good as or superior to any of the others.

Third, the use of a fixed list of problems to study disputing has been criticized. It is suggested that the fixed list approach is conservative in that it concentrates on problems already defined as legal, and does not consider problems which could (or should be) legally recognized.⁶ Further, it has been suggested that those who have not used the legal system previously will under-report the incidence of problems.⁷ These reservations were answered, at least in part, by rotating the list of problems, by affording the interviewee an opportunity to tell us about any other problems not mentioned, by referring to some problems for which there may be no or only a modified legal solution (e.g., invasion of privacy).⁸ A related problem concerns various perceptions. Some people may label a situation as a problem while others define the same event as something else leading to either over or underreporting.⁹ We attempted to meet

this concern by focussing on objective events (e.g., car accident, injury at work) but it remains the case that, particularly for some categories (e.g., discrimination, domestic issues) the "event" itself may be subject to a variety of interpretations. Finally, under the same point it needs to be said that by asking the survey respondent to answer for others as well as for self for problems occurring over a three year period, lack of knowledge about all of the affairs of others in the domicile and failures of memory likely yield a conservative estimate of problems and, perhaps, a distortion of outcomes.

Fourth, the more the data are disaggregated to provide insights about particular subgroups of households or activities, the more any conclusions from them must be treated as tentative because reliability decreases. This is a crucial point justifying elaboration. Because our sample was so large (over 3000 households) questions that were answered by all respondents yield very high estimates of reliability. However, as we then begin to analyze subgroups, the numbers become progressively smaller. For example, of all persons reporting a particular type of problem if only 50% sought compensation then further analysis of compensation seeking will be based upon a sample that is one half the size of the original sample. If 25% of compensation seekers contact lawyers then any data pertaining to lawyers will be based upon one quarter of one half of the original sample. In short, the numbers upon which estimates are made quickly diminish as disaggregation continues. Our purpose in the research, however, was to discern patterns and suggest hypotheses in terms of the

overall picture, not give definitive statements about exact numbers and proportions. For people wanting detailed knowledge about particular groups or issues (e.g., the homeless, Asian Canadians, lawyer-client relations in domestic disputes, work injuries) the basic methodology used in this study could be employed with samples of individuals or households associated with the categories of interest.

Fifth, the use of focus groups has the same problems as much qualitative research. The individuals are not representative since the numbers are so small and there is a factor of self-selection in terms of who will agree to be interviewed in this way. Moreover, it has been suggested that no matter how careful the interviewer/facilitator is with his/her questions, individuals can be guided towards responses. We have tried to be extremely careful in this regard and audio tapes are available should anyone wish to judge for themselves.

Finally, there is a theoretical criticism of the concept of dispute which needs to be addressed. The concept of dispute (and the related concepts of grievance and claim) forms a bridge between conflict which has been converted into a legal action and the much larger pool of conflict. It also allows cross-cultural comparison to be made.¹⁰ But it has been criticized as focussing on individuals as primary actors and thus overlooking significant aspects of conflict which are products of social, economic and political forces.¹¹ Thus "dispute" with its assumptions about equal individuals take no account of important power imbalances in society which may distort how disputes are processed, resolved

and even perceived.¹² Conflict as the product of collective or group action is ignored or at least de-emphasized.¹³

Whatever validity there is to such criticism -- we make no claim in this study to exclusivity -- we do not suggest the dispute-centred approach is the only way to study conflict and the law. Further studies might well attempt to assess how a court recognizes only conflict that it is prepared to address and conversely, to explore social conflict that is not now recognized as legal and to evaluate the relationship, if any, between these two factors.¹⁴ What we have attempted to do is produce results which will stimulate analysis and argument concerning influences upon the Canadian legal culture, not to pre-empt them.

Footnotes to Chapter 2

1. Miller and Sarat "Grievances, Claims and Disputes: Assessing the Adversary Culture" (1981), 15 Law & Society Review 525.
2. Fitzgerald, "A Comparative Empirical Study of Potential Disputes in Australia and the United States" Working Paper 1982-4, Disputes Processing Research Program, Law School, University of Wisconsin-Madison.
3. Miller and Sarat, footnote 1 supra, 527.
4. Information based on telephone contact with Statistics Canada. Ontario households with at least one telephone: 3,418,000; total Ontario households: 3,451,000. (Information based on May 1987 survey).
5. For example, for an international, cross-cultural survey see: Cappelletti and Garth (eds.) Access to Justice: A World Survey (1973) and see an American classic Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974), 9 Law & Society Review 95. The Ontario Law Reform Commission examined such issues in its Report on Class Actions (1982) Vol. I, 119-27.
6. Marks, "Some Research Perspectives for Looking at Legal Need

and Legal Services Delivery Systems: Old Forms or New"
(1976), 11 Law & Society Review 191.

7. Ibid.
8. Building on earlier work of one of the authors see: Vidmar and Flaherty "Concern for Personal Privacy in an Electronic Age" (1985) 35 Journal of Communications 91.
9. Felstiner, Abel and Sarat "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . ." (1981), 15 Law & Society Review 631.
10. But compare Felstiner, "Influences of Social Organization on Dispute Processing" (1974), 9 Law & Society Review 63 and Hayden & Anderson "On the Evaluation of Procedural Systems in Laboratory Experiments" (1979), 3 Law and Human Behavior 21.
11. Cain and Kulcsar, "Thinking Disputes: An Essay on the Origins of the Dispute Industry" (1981-82), 16 Law and Society Review 375; Kidder, "The End of the Road: Problems in the Analysis of Disputes" (1980-81), 15 Law and Society Review 717.
12. Tushnet, "Post-Realist Legal Scholarship" [1980] Wisconsin L. Rev. 1383.

13. Ibid., 1398. This is a charge to which one of us is particularly sensitive given our advocacy of such action elsewhere, e.g., Bogart, "Questioning Litigation's Role - Courts and Class Actions in Canada" (1986-87), 62 Indiana Law Journal 665 and Bogart, "Standing and the Charter: Rights and Identity" in Sharpe (ed.) Charter Litigation (1987).
14. Trubek, "The Construction and Deconstruction of a Disputes-Focussed Approach: An Afterword" (1980-81), 15 Law & Society Review 726.

Chapter 3

The Profile of Reported Problems in Ontario

The task of this chapter is to describe the problems that were reported by the 3024 households that were contacted for the survey. What kinds of problems were they? How frequently did they occur? What were they about and, if the problems could be translated into monetary terms, what were they worth? Finally, how were they distributed according to region, age, gender, income, education and other demographic characteristics? The question of how people respond to these problems will be left for subsequent chapters.

A. The Problems

Part of the data derived from these questions are summarized in Table 3.1. In that table are reported the percentage of households reporting a problem, the average dollar amount that was reported needed to rectify the problem, the median amount, and both the percentage and numbers of cases involving damages over \$20,000. While many readers are more familiar with averages the median, which describes the amount dividing the lower half of the amounts from the upper half, is for most purposes, a better summary statistic: a few large claims can distort the arithmetic average but the median is much less susceptible to their influence. Another way to respond to the distorting influence of large claims is to report their numbers. We arbitrarily decided a problem involving over \$20,000 would not be insignificant to

most Ontario residents. It should be noted, however, that there were a small number of problems reported to amount to over \$50,000 and a few over \$100,000.

(1) Torts

The first category of problems involves injuries or damage that would loosely fall under the rubric of torts. Respondents were asked about whether anyone in their household had experienced a problem involving \$1000 or more during the past three years with the following four areas: automobile accidents; injuries or health problems resulting from employment; other types of damage or injuries; and an accusation that they had accidentally or on purpose injured someone or caused property damage.

1. Automobile Accidents. Table 3.1 shows that 11.2% of households reported automobile accidents and that the median amount of the problem was \$2500. Of the accidents 37.5% involved injury to at least one member of the household. The form of accident ranged from two-vehicle accidents to collisions with bears and deer.

2. Employment Injury. Row A2 shows that 1.8% of households had someone who experienced a work-related injury or health problem and that, to the extent that such problems can be characterized in monetary terms, the median amount of the injury was \$2000. Males were more likely than females to be the victims of such injuries.

3. Other Damage/Injury. Another 1.2% of households reported other damages or injuries. These involved fights and assaults, slip and fall accidents, sports injuries, and allegations

of medical malpractice. The median amount of the injuries was reported to be \$4000.

4. Accusation of Injury/Damage to Others. Finally, 0.8% of households reported that they were accused of injuring someone or causing damage to property. The most common basis of the claim arose from automobile accidents.

(ii) Consumer Problems

Another category of problems involved the household as a consumer of items or services. In one question respondent were asked if there was a problem with an expensive item that was purchased, such as a car, boat, furniture, real estate or other property. A second question asked about the purchase of the services of a tradesperson: a health club, catering service, moving company, travel agent, homebuilder or renovator, and so forth. A third question identified services provided by "professions": doctor, dentist, lawyer, stockbroker, undertaker, or hospital.

1. Item Purchases. Row B5 of Table 3.1 shows that 4.8% of households had a serious problem with a major item that was purchased and that the median amount of the problem was \$2000. The problems frequently involved motor vehicles of various sorts but also included appliances and furniture. It is important to note here that a number of respondents interpreted this question to include damages sustained from theft or vandalism (15% of reported item purchase problems).

2. Trade Services. Approximately 1.7% of households experienced a problem with services purchased from a tradesperson;

the median amount of the problem was reported to be \$2000. The problems included the following services: travel agencies, moving companies, roofing companies, home contractors, photographers, recreational clubs, and "unlawful publication of pictures". A substantial number of the problems involved travel problems, but it is not clear from the reports whether the problem was with the travel agents or the organizations that were actually supposed to provide the services.

3. Professional Services. Row B7 shows that 1.4% of households reported problems with professional services. The services included those provided by doctors, dentists, hospitals, stockbrokers, lawyers, and ministers. While the median amount of the problems was \$2000 it should be noted that there were a number of somewhat larger claims that boosted the average to almost \$17,000.

(iii) Debt Problems

Respondents were asked two questions about debt; "Have you had problems collecting money of \$1000 or more owed by an employer, or collecting refunds, money loaned to someone, an insurance company, benefit program or a tenant?; and "Had any disagreement about debts of \$1000 or more with any individual or organization to whom you owed money such as a bank, credit card, loan company, department store or holder of a mortgage?"

Rows C8 and C9 show that 3.4% of households had problems collecting money and 1.3% had problems with claims that they owed money. The median amounts were, respectively, \$2000 and \$2100. Of money collection problems, 19% of the total involved a family

member or friend, 23% involved a client or tenant, 15% involved an employer, 18% involved an insurance agency, and almost 6% involved workers compensation. For debts owed, most of the problems involved a lending institution. Over 25% of the time the respondent household claimed the money had already been paid and in slightly over 25% of cases the respondent simply had difficulty in meeting the debt.

(iv) Discrimination

The survey was rather detailed in its questioning about problems of discrimination. We wanted to give this area particular attention, but it was also thought that some of the persons most likely to suffer discrimination perhaps needed the additional cueing that more specific questioning provides. Respondents; therefore, were given a definition of discrimination that included race, ethnic group, sex, age, handicaps, or union membership. With this definition they were asked whether anyone in the household had problems involving job promotion or job loss; working conditions or harassment; other employment problems; schooling and education; buying or renting housing; unjust dismissal from a job; or any other discrimination problem.

As Part D (Rows 10A to 10G) of Table 3.1 indicates there were altogether 213 discrimination complaints, divided among the various categories. However, the overall figure must be interpreted cautiously because households reporting discrimination often reported discrimination in several areas.

(v) Problems With Government

The interview also investigated problems with federal, provincial, and local government. It first asked whether there had been any problems collecting Canada Pension, Old Age Pension, Veterans welfare or unemployment insurance benefits. Next, problems with tax refunds and problems with immigration were inquired about. Then, inquiries about local government were made. The respondent was encouraged to name any other government problem. Finally, the respondent was asked about whether a government agency had claimed a member of the household owed money for such things as a government loan, taxes, or overpayment or unemployment insurance or welfare checks.

Section E of Table 3.1 shows that the biggest problem area involved collecting money from government (Row 11a). The number of government agencies involved were varied, but the majority involved social assistance and service agencies; respondents were usually not very specific about which particular agency was involved or even whether it was federal or provincial government that was involved, except that Revenue Canada accounted for almost 15% of the problems. The most common complaint was the slowness by which agencies responded. There were also a substantial number of complaints about unemployment insurance benefits. Unfortunately, we failed to ask about the amount of money involved in the problem, except to specify that it should involve \$1000 or more.

Problems involving the government claiming that a debt was owed were reported by 0.7% of the sample. The median amount was

around \$2000. Most of the difficulties involved Revenue Canada.

(vi) Invasions of Privacy

Respondents were also asked about whether they had experienced a "significant" invasion of privacy during the past three years, involving police, a government agency, an employer, a lending institution, or some other business.

The percentage of households reporting these various sources are presented in section F of Table 3.1. The specific sources that were named ranged across a wide spectrum of government and business agencies. Moreover, what people defined as a "significant" invasion of privacy also ranged across wide spectrum. At one end people objected to being asked for identification in order to cash a check to credit searches without authorization to forced police entry into homes. These varied responses are similar to those found in an earlier and more limited sample of Ontario residents conducted by Vidmar and Flaherty. While one may question whether some of the incidents are "significant" or even "valid" by some external standard the data do suggest that privacy is a sensitive issue to people who believe that their lives have been intruded upon.

(vii) Landlord Problems

Problems with landlords also received attention in the survey. Respondents were asked whether they had "any serious problems with a landlord such as problems over the rent, eviction, the condition of the property, or any other problems relating to the landlord?"

Section G of the table shows that 3% of households reported having a landlord problem and for those problems involving monetary issues the median amount was about \$1000. Of the total number of problems 37.8% of the time there was a threat of eviction or actual eviction. Problems involved pets, late rent penalties, insufficient heating, refunds and deposits, lack of repairs, "cockroaches", and entry into the premises without notice.

(viii) Divorce/Separation Problems

Another part of the questionnaire asked about problems attendant upon a divorce or separation. Specifically, respondents were asked whether there were "any serious problems with the terms of a divorce or separation in a marriage or common law relationship, such as problems over property division, support payments, child support, visitation, or custody?"

As Section H shows, 3 percent of households reported such problems. Interestingly, a substantial number of respondents stated that they or a member of their household were the one who did not live up to an agreement. Specific problems included failure to provide support custody disputes, and absconding with joint money or property.

B. Problems Per Household

While Table 3.1 describes the percentages of households experiencing each problem type it is also useful to use the household as the unit of analysis and inquire about the number of problems reported by average household.

Of the sample of 3024 households, fully 66% reported no

problems amounting to \$1000 or more of the type about which we were inquiring. The problem reporting of the remaining 34% of households was divided in the following way: 23% reported only one problem; 7% reported two problems, 3 percent reported three problems, and the remaining 1% of households reported between four and seven problems.

Another way to look at these same data is to say that the average Ontario household reported .52 problems over the three year period. However, among the households that reported a problem the average number of reported problems was 1.52 problems.

C. Demographics

Any inquiry about access to justice should be concerned about whether households with different socio-demographic characteristics experience problems at different rates. As a consequence the survey collected information about the characteristics of households and about household members who were most involved in the problems. These characteristics were as follows: gender, region (Northern Ontario, Toronto, and other parts of Ontario.), urbanization, age, education, occupation of respondent and of head of household, household size, ethnic background, religion, and annual household income.

These data will require more detailed analyses at a subsequent date, but our preliminary analyses yield some interesting tentative observations. The most striking finding is the relatively small number of correlations between household demographic characteristics and the reported experience of problems.

Toronto households were more likely to experience problems than households in the North or other regions of Ontario (An average of .63 problems versus, respectively, averages of .43 and .49 in the North and Other regions). Similarly, the more urbanized the setting the greater the tendency for households to report problems.

When the adult occupants of households were 45 years or older, the number of reported problems decreased rapidly. For example whereas the age 35-44 category was on average likely to report .56 problems, the 45-54 category reported .42 problems, the 55-64 category reported .35 problems, and the 65 or over category reported only .17 problems per household. The exact cause of this relationship can only be speculated upon. One hypothesis is that as households age they are less likely to perceive potential problems as problems. Another is that they are less likely to report them. Still another hypothesis is that as people age they are more likely to have their lives intact, they may have learned to anticipate and avoid problems, or their life activities (e.g., motor vehicle driving) are in areas less likely to result in difficulties. Additional research will be necessary to isolate causal relationships.

Degree of education was also related to problem reporting: e.g., households with less than high school education reported only .32 problems per household, and problem reporting increased directly upward with those households containing persons with university degrees or higher reporting .65 problems per household. Again, causal relationships are difficult to determine.

Persons with lower educational levels may be less likely to perceive or report problems. However,, it may also be that they are engaged in activities less likely to result in problems that amount to \$1000 or more.

Since education is also roughly related to income it was not surprising to discover that the higher the annual household income the more problems were reported: for example, households reporting income of \$15,000 or less reported on average only .40 problems whereas those with incomes of \$55,000 or greater reported .77 problems per household.

Households that were identified as Protestant or Catholic were less likely to report problems than those identified as Jewish or "Other".

Finally, households that were identified as Native Indian or Inuit were somewhat more likely to report problems (.61 problems per household) than those of all other ethnic groups (.52 per household for those identified as Canadian, British, Other European, or Asian). It should be noted that because our survey strategy did not specifically target on Native groups the sample of these households was relatively small, which could affect the reliability of this last finding. However, the finding would appear consistent with other things we know about the economic plight of native minorities.

These overall differences in problem reporting by demographic characteristics must, however, be considered in the light of some differences that emerge when problem types are disaggregated. For example, male respondents on the whole tended to

report more problems of almost every kind, except discrimination and post-divorce problems, where the pattern was reversed.

There were two exceptions to the general trend to report fewer problems as households increased in age. In the 55-64 age categories there were more reports of problems with government.

Ethnic group identification also had some exceptions. Households identified as "Canadian" reported substantially fewer tort problems than other categories of ethnic groups. Perhaps of no surprise households identified as Asian and Native Indian reported more problems with discrimination, with government, and for Native Indians only, more problems with landlords and divorce or separation. On the other hand both of these groups reported fewer problems with invasions of privacy.

As noted at the beginning of this section, these results need further analysis. However, to the extent that some of them are consistent with data from other sources, they lend support to conclusions about the validity of the survey strategy used in the study. Others identify problem areas requiring further investigation. Demographic characteristics are further considered in subsequent chapters of this report.

D. CONCLUSIONS

Over the three year period between January 1985 and December 1987 approximately one in three Ontario households reported one or more serious civil problems. There were some differences in the frequency of experienced problems as a function of demographic characteristics associated with the households: younger, better-educated, and higher income households reported more prob-

lems than older, less-educated, lower income households. Some exceptions to these trends were that households involving native peoples tended to report slightly more problems than households of other ethnic compositions and households involving respondents between the ages of 55-64 reported more problems with government.

Footnote to Chapter 3

1. Vidmar and Flaherty "Concern for personal privacy in an electronic age" (1985), 35 Journal of Communication 91.

Table 3.1
Reported Problems Over Past three Years (3024 households)

Problem Type	Number	Percentage of households	Average Amount	Median Amount	Percent over \$20,000 ^a
A. Torts					
1. Auto Accident	338	11.2%	\$ 8,034	\$2,500	4% (n=13)
2. Work Injury/health	54	1.8%	14,087	2,000	7% (n=4)
3. Other damage/injury	36	1.2%	92,252	4,000	23% (n=8)
4. Accused of injury/damage	24	0.8%	61,010	1,500	13% (n=3)
B. Consumer Problems					
5. Item Purchase	146	4.8%	3,675	2,000	3% (n=4)
6. Service Trade	53	1.7%	4,805	2,000	4% (n=2)
7. Professional Services	42	1.4%	16,997	2,000	2% (n=1)
C. Debt Problems					
8. Collecting money	102	3.4%	10,396	2,000	14% (n=13)
9. Debts owed	40	1.3%	6,872	2,100	7% (n=3)
D. Discrimination					
10a. Job promotion/loss	71	2.4%	--	--	
10b. Conditions/harassment	38	1.3%	--	--	
10c. Other job problem	32	1.0%	--	--	
10d. Schooling/education	26	0.9%	--	--	
10e. Housing: buy/rent	35	1.2%	--	--	
10f. Unjust dismissal	48	1.6%	--	--	
10g. Other	20	0.7%	--	--	
E. Government					
11a. Pension/welfare	93	3.1%	--	--	
11b. Tax refund	38	1.3%	--	--	
11c. Immigration	12	0.4%	--	--	
11d. Local government services	34	1.1%	--	--	
11e. Other	41	1.4%	--	--	
11f. Government claimed debt	22	0.7%	6,279	2,000	12% (n=3)

Table 1 continued

Problem Type	Number	Percentage of households	Average Amount	Median Amount	Percent over \$20,000 ^a
F. Privacy Invasion					
12a. Police	20	0.8%	--	--	
12b. Government agency	14	0.6%	--	--	
12c. Employer	14	0.6%	--	--	
12d. Financial institution	38	1.3%	--	--	
12e. Other business	14	0.6%	--	--	
G. Landlord	92	3.0%	3,242	1,000	2% (n=2)
H. Divorce/separation	72	2.4%	--	--	
I. Other problems	28	0.9%	--	--	

^aPercent calculated on the actual number of cases over \$20,000 (in parentheses) divided by the total number of cases of that problem type.

Chapter 4

Claims, Process, and Outcomes

How did the households that experienced problems respond? Did they make a claim asking for compensation or rectification? Did they seek outside help? Did the problem become a legal problem? What was the outcome? How satisfied do people feel about the outcome and about the process through which the outcome was achieved? These questions are at the core of the issue of access to justice and are the subject of this chapter.

One theme around which the research strategy was organized was that it often may make little sense to talk about "the system"; rather one must investigate different types of problems proceeding on different courses and eventuating in different outcomes and respondent satisfaction and sometimes involving individuals with different characteristics. As a consequence different problem types are disaggregated for the discussion that follows. For each type we asked how many claims for compensation arose from the problem; how often did household members seek legal help? How often did some form of court action occur? For those persons who considered the problem to be completed at the time of the interview we asked how much of their claim they received: all, most, some, or none of it. We also asked about the degree of satisfaction with the outcome and with the process by which the outcome was produced.

Before discussing the results in detail a point in terms of how the data was handled should be made. The respondents who did not state whether they claimed or not were distributed

proportionally between those who did.

A. The Problems

I. Torts

Table 4.1 presents data with respect to the four categories of torts as well as combined torts. The row labelled "claims" shows that the level of seeking compensation was, on average, about 60%. The next row shows how frequently lawyers were contacted for help when the household member(s) sought compensation and the "Other Agency" row indicates the frequency of seeking help from some non-lawyer person, organization, or business. These "other agencies" included insurance agents, local and city government, MPPs, unions, the workers' compensation board, the criminal injuries' compensation board. As will be described in a subsequent chapter these other agencies sometimes helped the party as an agent, but in other instances their principal role was to advise going to a lawyer. Thus, lawyers and agency contact are not mutually exclusive categories. The next row indicates that in about 11% of cases the complaint ultimately involved a formal filing in a court. None of the work injury problems went to court, but given worker compensation administrative mechanisms we would not normally expect any court action. Similarly, none of the claims of injury against the respondent household went to court either. Claims against individual household members do not seem to involve the legal system with any great frequency.

Perhaps the most striking finding in Table 4.1 is that for those persons who do seek compensation for injury the success

rate is pretty high: of those making a claim 68% said they got all of what they asked for and another 20% said they got most of it. They also indicated high levels of satisfaction with the outcome: overall, 56% were very satisfied and 24% were somewhat satisfied. However, about 1 in 5 persons said the process to resolution was too long and about 1 in 6 said it was too costly.

II. Consumer Problems

The first three columns of Table 4.2 present the same kinds of data for problems involving, respectively, expensive item purchases, services of tradesmen, and services of professionals. The patterns of claiming, process and outcome differ between problems. While 69% of persons with a purchase problem asked for compensation only 14% contacted a lawyer and in only 4% of cases did the problem result in legal action. In 58% of cases the claimant got all or most of what was asked for and 61% said they were satisfied or very satisfied. However, it needs to be noted that 25% of claimants received none of the claim and 37% were very dissatisfied with the final outcome; 36% said the process to resolution was too long and 31% said it was too costly.

In contrast 86% of households having a trade service problem made a claim and about 1 in 3 (36%) contacted a lawyer. About 1 out of every 10 claims (11%) resulted in a legal claim. Thirty-six percent of the time claimants received nothing. Satisfaction levels were modestly high but 41% said the process to resolution took too long.

Professional services involved a lower claim rate (60%), but when a claim was made a lawyer was contacted about the problem

38% of the time but the rate of going to court was much lower than cases involving service trades (4% versus 11% respectively). Fully 50% of claims resulted in the claimant receiving nothing and 57% of the claimants indicated that they were very dissatisfied with the outcome. The process was seen as too long by 65% of respondents and too costly by 60%.

These findings are generally consistent with those reported in Vidmar's study of problems involving amounts \$1500 or less. In contrast to item purchase and tradesperson problems, claims against professionals were less likely to be made, were less likely to be successful, and were likely to leave the household member dissatisfied. As one of us~~has~~ observed earlier there are at least two competing hypotheses to explain these characteristics of professional service problems. The first is that people hold professionals to unreasonable standards (at least in a relative sense) and ultimately come to a dead end with their grievances. An alternative hypothesis suggests that the grievances are meritorious however, professional services are more specialized, must be measured by indeterminate standards, and usually must be argued on the professional's own turf; thus, the chances of successful claims are reduced.¹

Clearly, professional services problems (doctors, lawyers, accountants, etc.) is an area that needs more thorough investigation. This could be done in a number of ways but one strategy would be to have a qualitative study which would investigate more intensely these problems: how they arose, what the individuals did about them, how defendants responded and on what basis. In

addition, the reaction of third parties (such as lawyers for both plaintiffs and defendants) could be interviewed and their opinions assessed through direct interviews. All this would be in aid of testing the alternative hypotheses which have just been advanced.

III. Debts

The next two columns in Table 4.1 involve either collecting money from someone or a claim that a household member was not fulfilling obligations with regard to a debt. Rates of making claims were modestly high. Seeking help and involvement of the legal system was modest. Of persons who were owed money 66% got all or most of what they asked for but of those owing debts, 43% got none of what they were claiming. Interestingly, a sizeable percentage (38%) of households falling in the former group were very dissatisfied with the outcome and the reason seems to lie with perceptions that the resolution of the problem took too long: 71% of respondents were dissatisfied with the process and 31% said it was too costly. Sizeable percentages of persons involved in owing money also saw the process as taking too long (44%) and being too costly (32%).

IV. Landlord Problems

For those households that experienced landlord problems the claim rate was 72%; of these claimants 28% contacted a lawyer and 21% contacted some other agency such as the rent review board. Very few claims entered the formal legal system. Forty-nine percent of claimants got all or most of what they asked for but

almost 1 in 3 (31%) received none of their claim. A majority of tenants (56%) were either very dissatisfied or somewhat dissatisfied with the final outcome.

V. Divorce/Separation Problems

Recall that at the beginning of this chapter we stated that respondents who did not state whether they claimed or not were distributed proportionally between those who did respond. This makes the figures for divorce/separation problematic since fully 61% did not respond. Therefore the data in this category must be treated with extreme caution.

Table 4.3 shows that 80% of persons experiencing divorce/separation problems made claims and 85% made contact with a lawyer with another 12% contacting some other agency. More than 1 in 4 of these claims (27%) resulted in legal action. It was not possible to calculate outcomes or satisfaction based upon completed cases because only 7% of persons with such claims stated that the problem was completed.

VI. Problems With Government Agencies

The various problems with government agencies showed similar patterns of process and outcome and thus were lumped together. These data are summarized in the second column of Table 4.3. Only 54% of households with problems arising out of government agencies made claims and fewer than 9% contacted a lawyer. About 1 in 5 contacted some other person or agency for help (usually another government agency or another person within the agency with which they were having problems or an elected official).

Only 2% of claims went to court. The Table also shows that of those making claims 68% got all or most of their claims-but almost half (48%) indicated that they were very or somewhat dissatisfied with the outcome. The source of dissatisfaction is probably delay since 63% indicated that the process to resolution took too long.

VII. Discrimination

Only 31% of persons made a claim with respect to what they regarded as their most serious problem of discrimination. Only 17% contacted a lawyer but 34% contacted some other agency, e.g., human rights commission, school principal, government agencies, the Ontario Labor Relations Board, Canada Manpower, labor unions, and provincial and federal members of parliament. The diversity of contacts for help with discrimination problems was striking and though numbers became small when the data are disaggregated by specific agencies it is worth making the observation that elected officials (MPs and MPPs) are frequently turned to for help. A possible explanation may be that these kinds of problems happen to relatively less affluent people and because of this they turn for help to other institutions which are free or at least less expensive. However, another explanation is that those who have these problems did not see them primarily as legal ones but more as social and political problems, or in any event, ones which the government should take some role in solving.

Most claimants did not have a successful outcome: 62% said they received none of their claim and a majority (54%) were very or somewhat dissatisfied with the outcome. Moreover, 40% said

the process of resolving the claim took too long.

VIII. Privacy

Among persons with invasion of privacy problems 42% made a claim and 28% contacted a lawyer. In contrast to discrimination problems relatively few claimants contacted some other agency. Only 2% of cases involved the formal legal system.

The table also shows that 40% of claimants received none of what they asked for and that 57% were either very or somewhat dissatisfied with the final outcome. Again there were complaints about the slowness of the process (41% of claimants) and 31% said it was too costly.

B. Demographics

In Chapter 3: We undertook some demographic analysis, at least regarding the most salient points in the data. Such analysis is also possible concerning the issues in this Chapter but unfortunately becomes a more difficult task. This is so because disaggregation of the data, as we move along the disputing path, means that numbers become smaller and as this occurs their reliability in terms of making statements becomes hazardous. Secondly, while important differences may emerge they are more subtle and are established only after intricate analysis which neither time nor resources permitted in time for the conference. We plan to undertake such an analysis.

C. Cross-Cultural Comparisons

As we have referred to earlier, studies which are similar in important respects to ours have been conducted in Australia and

the United States. As well, some aspects of an English study should be comparable. But each of these studies has differences both in methodology and the way the data is reported, which makes comparisons a very difficult enterprise, achieved only after very careful comparative data analysis. Again, we plan to do such analysis when time and resources permit.

D. Conclusions

Three points can be made by way of conclusion. First, levels of claiming are heavily dependent on the category of the claim. For example, those with a tort problem complained (sought compensation) 60% of the time whereas those with a discrimination problem complained only 31% of the time. These are substantial differences and indicate that access to the system and utilization of it may vary markedly depending on the nature of the problem.

Second, disputing strategies and the use of third parties can vary substantially depending on the problem. For example, 85% with divorce or separation problems utilized the services of a lawyer. This is perhaps not surprising, at least when the problem actually involves divorce since it will be necessary to have a court decree to obtain it and this fact may prompt individuals to use lawyers. Even many post-divorce and post-separation problems may require court intervention concerning such matters as custody and support and this also may prompt the use of lawyers. Whatever the reasons lawyers have a prominent role in this kind of dispute. By contrast, individuals use lawyers much less so for government problems (9%) and for

problems with discrimination (17%). However, they do contact other agencies: government problems (21%) and discrimination (34%). With discrimination not only is the percentage large but the range of the agencies is broad including, of course, human rights commissions but also school principals, government agencies, the Ontario Labour Relations Board, Canada Manpower, labour unions, and provincial and federal members of parliament.

This use of other agencies and non-use of lawyers raises interesting questions of why people adopt this strategy. One possible explanation may be that these kinds of problems happen to relatively less affluent people and because of this they turn for help to other institutions which are inexpensive or free. However, another explanation is that those who have these problems did not see them primarily as legal ones but more as social and political problems, or in any event, as problems which the government should take some role in solving. With government problems the strategy is comparatively successful: 68% ultimately get some or all of what they have claimed. However, with discrimination only 25% got some or all of what they had claimed whereas 62% received none of it.

Third, outcome and satisfaction varies widely dependent on the categories and, not surprisingly, how people did was closely connected to how satisfied they were. For example, individuals with tort claims (and most prominently victims of motor vehicle accidents) tended to receive the most: 88% got all or most of the claim. These individuals were also the most satisfied: 80% were "very" or "somewhat" satisfied and they were very unlikely

to complain that the process was too long (19%) or too costly (16%).

By contrast, household members with professional service problems obtained all of what they claimed only 21% of the time and fully 50% received nothing. In terms of satisfaction only 14% described themselves as "very satisfied" and 71% described themselves as "somewhat" (14%) or "very" (57%) dissatisfied; 65% thought the process was too long and 60% thought the cost was too high. A similar scenario develops in terms of those with discrimination problems. Only 14% received all of what was claimed and fully 76% received only some (14%) or none (62%). In probable consequence 54% described themselves as "somewhat" "very" dissatisfied. And 40% thought the process was too long though only 18% thought the cost too high.

How are these differences explained? Perhaps the easiest is discrimination. The reticence of its victims to take positive steps to react has been documented by others² and this hesitancy has been corroborated by the Miller and Sarat study which looked at the disputing terrain in the United States.³ What our results seem to reveal is that those who believe they have been the victims of discriminatory acts complain less often and are deeply dissatisfied with the outcome of their problems. Thus, allegations that victims of bias are likely to complain readily and even recklessly⁴ are totally unsubstantiated by these results. Indeed, the availability of comparatively accessible devices for redressing discrimination such as human rights commissions does not mean that complaints will turn to

them in numbers reflecting discriminatory acts or, indeed, that people even have sufficient knowledge of them.

More surprising, perhaps, are the negative attitudes and level of dissatisfaction resulting from problems involving professional services. Caution must be used in using these results since the numbers in this category are small. Nevertheless, the findings are consistent with those obtained by one of us in an earlier, more limited, study of minor disputes in Middlesex county.⁵ A number of these problems involve lawyers and doctors. Regarding lawyers, we have evidence elsewhere of satisfaction with their services⁶ and we will see that in the focus group sessions discussed in Chapter 8 the opinions which emerged of lawyers were in many cases very positive. However, when a problem arises with a professional that may become a lawsuit people seem very dissatisfied. This may be because people have an unreasonable expectation concerning the services of professionals and they, therefore, conclude fault too readily. Conversely, it may be because individuals feel the odds are against them when fighting with persons they see as better organized and with access to more sophisticated means to engage in disputing. In any event this area seems a strong candidate for more intensive and detailed study.

Finally, the high approval rates for torts generally and auto accidents in particular may at first be surprising in light of the amount of criticism levelled at modes of resolving claims for personal injuries whether on the highway,⁷ at work⁸ or elsewhere.⁹ Nor are we unmindful that there may be any number of

people who have suffered redressable harm who never claim because they simply are ignorant of their rights.¹⁰ This failure to claim by a high proportion of those suffering a loss as a result of mishap has been documented elsewhere.¹¹ Nevertheless, the results reported here are consistent with similar results obtained by one of us in a study of minor disputes done in Middlesex County.¹²

The level of satisfaction does not seem to depend on whether a court system is used or not -- the superiority of which is, at present, much debated¹³ -- since those suffering from injury at work, the majority of whose disputes it can be assumed would be amenable to resolution by the worker's compensation scheme or in the shadow of it, report levels of satisfaction which are very similar.¹⁴

However, the limits of what we are reporting here needs to be emphasized. These figures indicate that individuals who engaged in claiming behaviour for automobile accidents (and torts generally) are comparatively well satisfied with the process, with lawyers fees and with the results. They say nothing about a number of policy issues. For example, whether the incidence of claiming is too low given the number of problems and whether this incidence is because of barriers which can and should be removed.¹⁵ Nor do they speak directly to specific problems which may affect a comparatively small number of people (relative to the total number who have problems) but in very significant ways : for example, those with occupational disease¹⁶ or those in motor vehicle accidents for which the loss to the individual can be devastating, regardless of where liability is placed.¹⁷

Perhaps the comparatively high levels of satisfaction have

something to do with the sense of control individuals with these kinds of complaints have. An injury from an accident with an automobile is a relatively straightforward event both legally and factually. Those injured are much more likely to sense that they have a redressable claim and to know the way to assert such a claim. They may even be contacted initially by an insurance adjuster or someone in the workplace who will educate them in terms of claiming relief. This sense of control may carry over even into the formal legal process and, of course, may be fed in greatest part by the fact that in the end individuals in the automobile category get all or most of what they claim in far greater proportions than in other categories.

The theme that has been struck here is that, while people's experience with the justice system and their satisfaction to it can be described globally, it may be more informative and insightful to look at the kinds of problems they have experienced because their claiming and disputing behaviour and their satisfaction with the system may vary significantly depending on the problem they have. Further evidence of this point will be presented in Chapters 6 and 7.

Footnotes to Chapter 4

1. Vidmar, "Seeking Justice: An Empirical Map of JConsumer Problems and Consumer Responses in Canada" (1980), 25 Osgoode Hall L.J. ____ (forthcoming).
2. Bumiller, The Civil Rights Society (1988); Macaulay, "Law and the Behavioral Sciences: Is There Any There There?" (1984), 6 Law & Policy 149, 179; "The Inequality Goes On" The Globe and Mail, 25 Monday 1988, A6; Rauhala, "Mandatory Job Quotas Called Cure for Discrimination in Public Service" 11 April 1988, A13.
3. Miller & Sarat, footnote ____ supra, 540-42.
4. Wilson, "Minorities Often Claim Discrimination, Judge Says" The Globe and Mail, 24 March 1988, A10.
5. Vidmar, footnote 1 supra.
6. Yale, "Public Attitudes Towards Lawyers: an Information Perspective" in Trebilcock and Evans (eds.) Lawyers and the Consumer Interest (1981). In this article Yale discussed various surveys and opinions polls in Canada and other countries regarding people's attitudes toward lawyers including a Canada-wide client survey conducted by the Canadian Gallup

Poll for the Canadian Bar Association in 1978. At 49 she observes:

The majority of respondents in the studies under consideration appeared satisfied with the service they had received from lawyers. Two-thirds of the Canadian Gallup Poll sample indicated that their experience with lawyers generally had been good, while only 7% reported that their experience had been poor. Similarly, over 80% of respondents in the American and British surveys indicated that their experience with lawyers generally had been good, while only 7% reported that their experience had been poor. Similarly, over 80% of respondents in the American and British surveys indicated that they were extremely or fairly satisfied with the service received. Ontario clients for the most part (71%) felt that their lawyer had done a competent job; about two-thirds indicated that their lawyer had done everything possible on their behalf.

7. For example, Hutchinson, "Beyond No-Fault" (1985), 73 Calif. L. Rev. 755.
8. For example, Weiler, "Reshaping Workers' Compensation for Ontario" (1980); Weiler, "Protecting the Worker from Disability: Challenges for the Eighties" (1983); Weiler, "Permanent Partial Disability: Alternative Models for Compensation" (1986).
9. For example, Harris et al., Compensation and Support for Illness and Injury (1984), an empirical study of compensation for serious illness or injury in England.

10. Felstiner, Abel and Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . ." (1981), 15 Law & Society Review 631.
11. Harris et al., footnote 9 supra. While almost half the victims of both road and work accidents considered claiming less than a tenth of victims of "other" accidents did so; between one-quarter and one-third of the former categories consulted a lawyer but only three percent of the latter (62, Fig. 2.2). In consequence, while only 29% of road accident victims recovered damages and 19% of work accident victims did so a mere 2% of "other" accident victims did so (51, Table 2.2).

See also Abel, "A's of Cure, Ounces of Prevention" (1985), 73 California Law Review 1003.
12. Vidmar, footnote 1 supra. While 70% of all those with problems complained 74% did so for motor vehicle problems. While 41% received some remedy ("restitution") 96% did so for motor vehicle problems. While 55% of those complaining were "very satisfied" (38%) or "somewhat satisfied" (17%), 75% were "very satisfied" (60%) or "somewhat satisfied" (15%) of the complaining about motor vehicle problems.
13. For example, Report of Inquiry Into Motor Vehicle Accident Compensation in Ontario, The Honourable Mr. Justice Coulter A. Osborne Supreme Court of Ontario Commissioner (1988);

Trebilcock, "Where Do the Bucks Stop? Have Reports of the Demise of Fault Been Exaggerated?" (1987), Seventeenth Annual Workshop on Commercial and Consumer Law).

14. Indeed, the vast majority of the public may have no clear view of the merits of fault-no fault at least as a basis for their satisfaction with disputing. The comment of the Osborne Report, footnote 13 supra, may be apt (1509, Vol. I):

Through the canyon separating those who favour the demolition of the tort system and those who favour its renovation drive most of Ontario's insured motorists, largely unaware of what the tort system is, and what no fault insurance means. I think it is because of this general lack of public awareness that the no fault/tort law debate has not been a significant concern to consumers.

15. See, Abel footnote 11 supra.

16. For example, Barth, "Workers' Compensation and Asbestos in Ontario" (1982, study for the Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario); West, "Compensating Occupational Cancer in Michigan and Ontario: A Comparative Perspective" (1988), 3 Journal of Law and Social Policy 138.

17. Grant, "Quadriplegic Unaware of Furor His Crash Caused" The Globe and Mail 7 March 1988, A14 (discussing the total dependency of the plaintiff McErlean in the "Brampton Dirt Bike Case" upon his parents after having lost the appeals).

Table 4.1

Problems, Solution Seeking, Outcome and Satisfaction: Torts

	Auto Accidents	Work Injury	Other Injury	Injury Claimed	All Torts
Total Problems	338	54	36	24	452
Claims ^a	588	708	628	--9	608
Lawyer contact ^b	338	178	328	228	308
Other agency ^c	98	218	128	268	128
Court Action ^{d,e}	138	08	98	08	118
Outcome: ^{e,f}					
All of claim	708	568	538	--9	688
Most of claim	168	338	338	--	208
Some of claim	88	118	138	--	88
None of claim	58	08	08	--	48
Satisfaction ^{e,f}					
Very satisfied	608	608	578	298	568
Somewhat satisfied	228	308	368	298	248
Somewhat dissatisfied	98	108	08	298	88
Very dissatisfied	108	08	78	138	88
Process: Too long ^e	198	128	308	208	198
Process: Cost too high ^e	158	258	238	98	168

^aAs percentage of total problems.^bAs percentage of those who made claims.^cAs percentage of those who made claims. Refers to any other agency, e.g., government; mediator; arbitrator.^dAs percentage of claims; includes only legal action with lawyer help.^eBased upon completed problems.^fPercentages may not tally to 100% because of "don't know" or "not stated" and rounding errors.^gClaim is not appropriate since the respondent is being claimed against.

Table 4.2

Problems, Solution Seeking, Outcome, and Satisfaction:
Consumer Problems, Debts, and Landlords

	Item Purchase	Service Trade	Professional Services	Collecting Money	Debts Owed	Landlord Problem
Total Problems	146	53	42	102	40	92
Claims ^a	69	86	60	82	72	72
Lawyer contact ^b	14	36	38	33	22	28
Other agency ^c	15	18	17	14	14	21
Court Action ^{d,e}	4	11	4	4	7	2
Outcome: e, f						
All of claim	47	32	21	45	43	44
Most of claim	11	14	14	21	13	5
Some of claim	16	18	14	16	0	21
None of claim	25	36	50	18	43	31
Satisfaction ^{e, f}						
Very satisfied	46	27	14	26	35	40
Somewhat satisfied	15	27	14	28	26	5
Somewhat dissatisfied	1	15	14	10	22	33
Very dissatisfied	37	31	57	38	17	23
Process: Too long ^e	36	41	65	71	44	26
Process: Cost too high ^e	31	16	60	31	32	15

^aAs percentage of total problems.^bAs percentage of those who made claims.^cAs percentage of those who made claims. Refers to any other agency, e.g., government; mediator; arbitrator.^dAs percentage of claims; includes only legal action with lawyer help.^eBased upon completed problems.^fPercents may not tally to 100% because of "don't know" or "not stated" and rounding errors.

Table 4.3

Problems, Solution Seeking, Outcome, and Satisfaction:
Government, Divorce, Discrimination, and Privacy

	Divorce Separation	Government Agencies	Discrimination	Privacy
Total Problems	71	240	271	102
Claims ^a	80%	54%	31%	42%
Lawyer contact ^b	85%	9%	17%	28%
Other agency ^c	12%	21%	34%	9%
Court Action ^{d,e}	27%	2%	6%	2%
Outcome: e, f				
All of claim	25%	59%	14%	36%
Most of claim	0%	9%	11%	4%
Some of claim	75%	10%	14%	20%
None of claim	0%	22%	62%	40%
Satisfaction: e, f				
Very satisfied	--g	34%	23%	19%
Somewhat satisfied	--	10%	23%	25%
Somewhat dissatisfied	--	27%	11%	16%
Very dissatisfied	--	21%	43%	41%
Process: Too long ^e	--g	63%	40%	41%
Process: Cost too high ^e	--	19%	18%	31%

^aAs percentage of total problems.^bAs percentage of those who made claims.^cAs percentage of those who made claims. Refers to any other agency, e.g., government; mediator; arbitrator.^dAs percentage of claims; includes only legal action with lawyer help.^eBased upon completed problems.^fPercentages may not tally to 100% because of "don't know" or "not stated" and rounding errors.^gSample size was too small to make reliable comparisons.

Chapter 5

Those Who Did Not Seek Compensation

Despite previous research indicating that it is difficult to elicit explanations from persons who do not seek compensation for problems,¹ we still felt it was essential to make an attempt. After all, in a large percentage of instances of reported problems no request for compensation was made. Are these the persons for whom it may be said there is no access to justice? Are these persons mistrusting of and alienated from the legal system?

A. Seeking Help.

Respondents were first asked whether they sought advice or help from a lawyer or other organization about their problem.

Only 16% said they had contacted a lawyer. For those who did not contact a lawyer the following reasons were given: never thought of it (9%); wouldn't do any good (29%); not a legal problem (20%); costs too much (19%); prefer to handle problems myself (16%); insurance handled it (4%); don't trust lawyers (fewer than 1%); don't know where to find a lawyer (fewer than 1%); my fault (1%).

Another 15% (partially overlapping with those who consulted lawyers) said they had contacted some other agency or organization. The list of such organizations or persons was wide-ranging (e.g., insurance adjustors; police agencies; relatives and friends; unions; doctors; compensation board; labor board; ministers; accountants; and various agencies and businesses having some connection to the problem). Respondents were then asked why they subsequently did not seek compensation after this consulta-

tion. The reasons and the percentage of households giving them were as follows: didn't think it would do any good (30%); had no justifiable reason for asking for payment (31%); no injury to self/other household member (13%); partly my fault (14%); too much time or hassle (8%); couldn't find other party (10%); didn't know who to complain to (9%); would cost too much (1%). Taken as a whole these reasons suggest that the impact of consulting with an outside source was to convince the respondent (or other household member) that probably the case did not have merit or, even if it did, the chances of successful recovery were small.² This seemed particularly true for problems involving work injury, and discrimination.

B. Failure to Complain

Among the households that did not seek outside help and did not ask for compensation we also inquired why. The following reasons were given for keeping the problems to themselves: prefer to handle problem myself (22%); no help needed (10%); didn't think some other source could help (25%); did not know where to go (13%); insurance handled (7%); don't know why (9%). Interestingly, in this group no respondent indicated that the problem was partly his or her fault.

C. Satisfaction

As with persons who sought compensation, respondents were asked how satisfied they were with respect to the problem. Sixty-six percent of respondents indicated that in their view the problem was now completed (over with) and 31% said it was still

ongoing. Rates of satisfaction were very different between these two categories.

Persons who said the problem was still ongoing were asked: "To date, how satisfied do you feel about the progress of resolution of the problem? Only 2% said they were very satisfied, 15% said somewhat satisfied; 24% indicated somewhat dissatisfied and 55% said very dissatisfied.

For persons who said the problem was over, the rates of satisfaction were substantially higher: in response to the question, "How satisfied do you feel about the final outcome of the problem?", 25% said they were very satisfied, 25% indicated somewhat satisfied, 20% responded somewhat dissatisfied and 21% said very dissatisfied.

Several hypotheses may be advanced for these differences. The first is that the kinds of problems that were likely to be categorized as completed were different than ongoing problems. Indeed, in partial support of this hypothesis work injury (62%), other injury (53%), debts involving private relationships (41%) and government relationships (42%), landlords (40%) and divorce (87%) were more likely to be classified as ongoing whereas automobile, consumer, discrimination, and privacy problems were more likely to be categorized as completed. Another hypothesis is that some of the persons indicating ongoing problems still planned to seek compensation. A third hypothesis is that respondents who classify problems as ongoing are just more likely to feel dissatisfied. Additional analyses of the data may be able to shed light on these various hypotheses, but for now they

are left as alternative explanations.

D. Attitudes Toward the Legal System: Compensation Seekers and Non Seekers

One hypothesis sometimes set forth to explain the failure of persons to seek compensation for problems is that they have no faith or trust in the legal system or do not feel competent to deal with it. As is discussed in more detail in Chapter 7 all respondents in the survey were asked to indicate their attitudes with respect to a number of questions about the system of justice on Ontario. In comparing persons who did not complain about problems with those who did no differences were found in beliefs that the legal system is fair, in knowledge about legal rights, and in feelings of being victims of business or government. To the extent that negative attitudes about these matters can be seen as measuring alienation, there is no support for the hypothesis that the persons who failed to seek compensation were more alienated from the legal system than those who made claims.

E. Conclusion

The data on why people do not seek compensation for problems are far from definitive. Nevertheless, they do suggest the reason is not that they have less faith in the legal system, feel less competent, or feel more victimized. The data from this chapter and the preceding one, moreover, do not suggest substantial differences in compensation seeking between households in various levels of the socio-economic strata. For those who sought outside help from lawyers or other agencies there was a tendency to see the claim potential as less meritorious or less

recoverable. Perhaps similar doubts were in the minds of persons who did not seek outside help, but the data are not clear on this matter. On the other hand a substantial number of persons indicated that they felt that the problem was not one for lawyers or other third parties. The data on this matter are also not definitive, but they are quite consistent with previous research on responses to problems. In a series of studies involving random samples of Canadian adults Vidmar and Schuller³ found that some people with problems simply prefer to avoid confrontation if at all possible. Perhaps these dispositional tendencies account for at least part of the finding that substantial numbers of persons felt satisfied with the outcome of their problem even though they did not seek compensation. Still, there may be a substantial number of people who do not seek compensation in circumstances where they would receive at least some of the claim. If this is so how these individuals can be encouraged to do so remains unclear.

Footnotes to Chapter 5

1. Vidmar, "Seeking and Finding Justice: An Empirical Map of Canadian Consumer Problems and Responses" (1988), 25 Osgoode Hall Law Journal -- (forthcoming).
2. Whether the advice was valid or not is a subject that will not be pursued further at this point.
3. Vidmar and Schuller, "Individual Differences and the Pursuit of Legal Rights: A Preliminary Inquiry" (1987), 11 Law and Human Behavior 299.

Chapter 6

Lawyers: Utilization Patterns and Client Responses

Lawyers play a central role in dispute resolution and the justice process. Often, their role is controversial. The news media print stories about allegedly dishonest and predatory lawyers who charges too much for their services. Survey data from previous studies has sometimes suggested that the public shares this view. Our study provides an excellent opportunity to shed some light on the controversy. Unlike some of the previous studies that have asked about lawyers in the abstract and therefore may be obtaining responses based on stereotypes and criticisms derived from the mass media, our respondents were responding to actual problem experiences in which lawyers were consulted or at least could have been. Thus, the data tell us something about reactions to lawyers in the actual context of their activities.

Some of the data pertaining to this topic were presented in earlier chapters of this report. However, these will be reported again in the interest of consolidating what can be gleaned from the study of people with problems.

A. Lawyer Use and Non Use.

As can be gleaned from Chapter 4 (Table 4.1-4.3), for the total of all problems people who sought compensation contacted a lawyer 26% of the time (in another 6% of cases the survey respondent did not know whether a lawyer had been contacted). The rates of lawyer contact varied by the type of problem. In 48% of

the cases the contact was made before compensation was requested, and in 43% it was made afterward (in 9% of cases the respondent did not specify). These figures did not vary substantially by type of problem except in cases involving landlord disputes where 65% of persons made contact after a complaint was made.

Among persons who had a problem but did not seek compensation, 16% contacted a lawyer for advice. Our data are not clear about whether the lawyer dissuaded them from making a claim or whether other factors played a part in their decision to let the matter drop.

We also inquired about how they choose the lawyer that they contacted. About 32% said that they had used the lawyer previously; 40% said some other person or organization had referred them; 7% said another lawyer referred them; 9% indicated the lawyer was found through the yellow pages and 3% indicated that they choose their lawyer because her location was convenient. The mode of choice did not differ between problem types except for workmen compensation and other injuries which almost exclusively resulted in referrals by an organization.

B. Decisions to Not Consult a Lawyer.

Persons who made a complaint but did not contact a lawyer gave the following reasons for their actions: it was not a legal problem/lawyer not appropriate (25%); a lawyer would cost too much (17%); prefer to handle it myself (19%) it would do no good (19%); it was not important enough (7%). Only 1% gave the reason that they do not trust lawyers and 1% said they did not know where to find one.

For persons who did not ask for compensation, the following reasons were given for not contacting a lawyer: never thought of it (9%); wouldn't do any good (29%); not a legal problem/lawyer not appropriate (20%); costs too much (19%); prefer to handle problems myself (16%); had other help (5%); not important enough (16%). Fewer than 1% said they did not trust lawyers or did not know where to find one.

The insight that emerges from both sets of respondents is that mistrust of lawyers is apparently not a significant reason for avoiding them when faced with a problem. Further, the potential cost did not loom large in these retrospective accounts of respondents. More likely people prefer to define the problem in non-legal terms and handle problems themselves.

C. Lawyer Activities.

Overall, compensation seekers who contacted a lawyer said that 37% of the time the lawyer only gave advice and did not act for them in any other capacity. Advice only was most common with respect to government (73%), privacy (54%) and landlord (85%) problems. When a lawyer did act for the client 41% of the time the action eventually involved filing a claim in court or some other tribunal.

D. Lawyer Fees.

Questions were also asked about legal fees. For those who contacted a lawyer we asked who paid for the lawyer. For all cases respondents indicated that 23% of the time the service was free; in 37% of cases it was paid for by the respondent or

another household member; in 13% of cases the other side paid; legal aid was mentioned in 5% of cases; and slightly fewer than 2% of cases involved pre-paid legal services (in the remaining cases the respondent did not know who paid for the lawyer). Self payment was more likely when the matter involved consumer problems (46%), debt problems (60%), invasion of privacy (44%) and divorce (61%). We also asked whether the lawyer had discussed fees in advance of taking action. Thirty-eight percent of respondents said yes, 50% said no, and 12 did not know (presumably because another household member had handled the transaction).

Respondents were also asked about justifiability of the lawyer's fee: 19% said it was too high; 50% said it was about right; 9% said it was too low; and 18% said the question was not applicable, perhaps indicating that in some cases no fee was charged. Respondents who had consumer problems were more likely to say the fees were too high (28%), but those involved with auto accident problems were more likely to say the fee was about right (61%) and only 6% said it was too high. Another way of assessing reactions to costs involves the respondents who in rating the final outcome of the problem said the costs were too high (see tables 4.1 to 4.3). Approximately 25% mentioned lawyer fees whereas the remainder mentioned other transaction costs such as loss of salary and wages.

E. Conclusion

The data reported in this chapter must be treated cautiously because sample sizes became smaller as we progressed through the tree of questions, a fact which reduces reliability of findings. Additionally, more statistical analysis from the existing data set may modify some of the conclusions. It is noteworthy, however, that for persons who said it took too long to resolve their problem, only 14 blamed it on their lawyer.

With all of these caveats in mind a tentative conclusion is that the negative image of the lawyers that is sometimes portrayed in the mass media is not shared by the majority of persons in the context of significant problems. Those persons who did not consult lawyers indicated little animus toward them, only a belief that the problem could be handled in another way. For persons who contacted lawyers some amount of free advice was given. For those who retained and paid for a lawyer the majority thought the fee was about right but this varied depending on the type of problem. We will return to the public's reaction to lawyers in Chapter 8.

CHAPTER 7

General Attitudes About Access and Civil Justice

The survey also asked every respondent, whether they had a serious problem or not, some questions about the general system of justice and about their ability to deal with problems when they arise. These attitudes are the subject matter of this chapter. This was not a comprehensive attempt to test people's attitude towards the justice system--more elaborate studies have been recently undertaken in Canada and these will be referred to. It was, however, an attempt to ask what we believed were some important questions about people's perception of the system in the context of their experience with specific problems and their resolution.

A. The Questions and the Overall Responses.

The exact questions asked the respondents are reported along with the breakdown of responses from the total of 3024 household respondents. Interesting breakdowns by region or other demographic characteristic, along with results from the other studies just referred to, are then discussed before proceeding to the next question.

A. Now I'd like to get your opinion relating to some statements people have made about the kinds of problems I have been asking about. Some people say they have a lot of knowledge about their legal rights when problems arise, but others say they have almost no knowledge. Would you say you personally have. . .

1. A lot of knowledge about your legal rights	15%
2. Some knowledge	47%
3. A little knowledge	27%
4. Almost no knowledge	11%

Persons who had a problem reported higher levels of knowledge than those who did not. Males reported slightly higher levels of full knowledge than females; and persons from the Northern Region of Ontario reported slightly higher levels of knowledge than persons from the other regions. Persons 65 or older reported less knowledge, as did persons with less education and lower levels of income. Persons who described themselves as ethnically Canadian reported higher levels of knowledge than other ethnic groups.

These finds are related to, but somewhat more positive, than the responses obtained in the Department of Justice national survey on attitudes towards the justice system in June 1987.¹ In that study 88% of the public agreed strongly (47%) or somewhat (41%) that they did not know enough about the Canadian system of justice. Likewise, 87% agreed strongly (60%) or somewhat (27%) that the justice system is too complicated for an ordinary person to understand.²

B. In dealing with problems like the ones we have been talking about, do you feel the legal system in Ontario is generally. . .

1. Very fair	15%
2. Somewhat fair	50%
3. Somewhat unfair	16%
4. Very unfair	5%
5. No opinion	6%

People who had reported household problems were less likely to view the system as very fair or fair than did those who did not (65% versus 76%). Native Indians/Inuit were less likely to consider the system fair than other ethnic categories.

In the Department of Justice study a number of questions were asked about the "fairness" of the system. While three-quarters of Canadians replied that the law treats the average Canadian fairly and two-thirds believed that everyone is equal before the law, three-quarters also believed that the law favours the rich.³ Similarly, in the study in Montreal, Toronto and Winnipeg conducted by the Legal Research Institute of the Manitoba Faculty of Law "a majority of respondents indicated that something needs to be done to improve the way the legal system operates and the law it produces; that the legal system favours the rich and powerful . . ."⁴

C. Some people say that with respect to the kinds of problems we have been talking about they are victims of business. To what extent do you share this feeling? Would you say you. . .

Agree strongly with this statement	12%
Agree somewhat	37%
Disagree somewhat	31%
Disagree strongly	14%
No opinion	7%

Persons reporting household problems were more likely to agree than persons not reporting problems. Older persons (from age 45 upward) were less likely to agree than younger persons.

D. Some people say that with respect to the kinds of problems we have been talking about they are victims of government. To what extent do you share this feeling? Would you say you. . .

1. Agree strongly with the statement	17%
2. Agree somewhat	36%
3. Disagree somewhat	27%
4. Disagree strongly	12%
5. No opinion	8%

Persons reporting problems were more likely to agree strongly with the statement than those not reporting a problem (25% versus 12%). Older persons were less likely to agree than young-

er persons. Native Indians/Inuit were substantially more likely to strongly agree and persons of Asian ethnic background were substantially less likely to agree than other ethnic categories.

E. I'm going to read you a couple of statements that people have made about the justice system in Ontario and I'd like you to tell me whether you agree or disagree. Do you agree or disagree? Is that strongly or somewhat?

1. If I had a problem that required legal attention or legal action I would expect there would be a lot of delays in getting it solved. . .

a. Agree strongly	44%
b. Agree somewhat	33%
c. Disagree somewhat	13%
d. Disagree strongly	5%
e. No opinion	5%

The Manitoba survey reported that a majority of respondents thought "that it takes too long to get anything done through the legal process."⁵

2. I probably wouldn't bother disputing most legal problems because the cost of doing so would be too high. . . .

a. Agree strongly	44%
b. Agree somewhat	28%
c. Disagree somewhat	15%
d. Disagree strongly	9%
e. No opinion	5%

3. Canada must maintain a good and fair justice system, regardless of the costs. . . .

a. Agree strongly	64%
b. Agree somewhat	25%
c. Disagree somewhat	5%
d. Disagree strongly	3%
e. No opinion	4%

4. Compared to other ways the government spends money, the justice system is a good use of taxpayers' dollars. . .

a. Agree strongly	34%
b. Agree somewhat	35%
c. Disagree somewhat	15%
d. Disagree strongly	10%
e. No opinion	5%

The Department of Justice survey asked very similar questions and the responses were consistent but even higher. Ninety-six agreed strongly (78%) or somewhat (18%) that maintaining a good system is critical despite the cost and 80% agreed strongly (45%) or somewhat (35%) that the justice system is a good use of taxpayers' dollars compared with other ways the government spends money.⁶

F. An alternative in dealing with the problems we have been asking about may be to negotiate a settlement of the dispute before even starting court proceedings, using a non-lawyer called a mediator or counsellor. In your opinion, should the law require people to attempt to settle disputes through such mediators or counsellors before starting court proceedings?

Yes	72%
No	9%
Maybe	11%
No opinion	8%

The Department of Justice study pursued issues surrounding alternative methods of dispute resolution further but only in the context of mediating divorce disputes. In that study 85% supported the concept of mediating divorce disputes and 81% responded positively to requiring people to attempt to settle divorce disputes through mediators before resorting to courts. However, only 28% of the public know that divorce mediation services exist in Canada and 41% did not know where they would find divorce mediation services if they needed them. Further, there was no strong consensus among Canadians regarding payment for divorce mediation; for example, 45 % said the couple should pay, 33% that both the couple and the government should pay, depending on the couple's ability, and 19% thought the government should pay for lower income people only.⁷

B. Demographics

The results of the attitudinal questions were perhaps most interesting for the differences which they did not reveal in terms of demographics. For example, we found no appreciable differences in attitudes towards the legal system between urban and rural inhabitants or between those in northern Ontario and elsewhere in the provinces, though some literature might lead us to hypothesize such differences.⁸

We also thought some differences might emerge along gender lines⁹ but those that did were not striking.¹⁰ Men indicated, at the extremes, that they have more knowledge of their legal rights than women ("a lot" Men: 17%, Women: 14%; "almost no knowledge" Men: 9%, Women: 13%). Moreover, men were more likely to disagree strongly that they were victims of government (Men: 17%, Women: 11%). Otherwise, in terms of the fairness of the system, a sense of being a victim of government, expectations of delay and high cost in dealing with legal problems and in support for a good and fair justice system there were virtually no differences.

Perhaps not surprisingly the greater the household income (under \$15,000 versus over \$55,000), the greater the education (some public school versus some university), and the higher the household occupation (professional managerial versus sales/clerical) the more likely the respondent was to register confidence in the legal system, though again, the relationship was not as clear as might be expected. Regarding knowledge of legal rights 74% of persons with a household income over \$55,000 indicated a lot or

some knowledge, but only 49% of those with household income less than \$15,000 did. Concerning the fairness of the legal system 75% of those who had some university education thought it was "very fair" or "somewhat fair" but only 66% of those with less education agreed with those characterizations. In terms of being victim of business 55% of households earning more than \$15,000 agreed with this characterization but only 43% of households over \$55,000 concurred. Regarding the likelihood of not disputing legal problems because of the high cost, 82% of persons with some or all of public school agreed, but only 64% of those with at least some university experience agreed.

The sharpest differences emerged with respect to native peoples. Caution must be exercised using these results since the absolute numbers of native people responding were so small. Nevertheless, the trend in the results is consistent: native people expressed an alienation from the civil justice system. In terms of expectations of delay and cost of disputing native people were close to the overall figures. But in terms of knowledge of legal rights native people thought they had less. They tended to believe less that the legal system was fair and to see themselves more as victims of both business and government. Native peoples agreed less with the need to maintain a good and fair system of justice and with the statement that the justice system was a good use of the taxpayers' dollars. Even in terms of use of alternatives they registered less support.

These results are further support for other studies (mostly focussed on the criminal justice system) that establish that

native people are estranged from the justice system.¹¹ The truly difficult question is how to alter such attitudes. Whether the justice system can be made more accessible and responsive apart from a massive alteration in the entire relationship between native peoples and the dominant society is a complex and insistent issue.

C. Responses by Problem Type

In Chapter Four we indicated that people's claiming, disputing strategies and what they ultimately received and their satisfaction with it were closely related to the particular problems they had. It, therefore, is more instructive in many ways to analyze the justice system in terms of specific types of problems rather than to draw conclusions about it at some global level.

The same appears to be true in terms of general attitudes but we are cautious here until detailed data analysis is performed. Tentatively, it seems that individuals' attitudes toward the system are related to the problems they experience. For example, those with tort problems (and most prominently motor vehicle) tend to register comparatively high levels of confidence. But those with professional service and discrimination problems tend to have more negative attitudes toward the system.

D. Conclusion

First, significant numbers of people indicated that they felt that they were victims of business and government. Moreover, a substantial majority thought that the cost of the system is too high and that it takes too long. However, on the whole, people felt that the justice system in Ontario is fair and that the tax dollars used to support it are a good investment. Despite these positive feelings about the legal system most people indicated that an attempt should be made to resolve disputes without engaging court proceedings; in other words, there was support, at least at a general level, for introduction of forms of alternative methods of dispute resolution. A majority of people thought they have at least some knowledge of their legal rights.

Second, regarding demographics, an important point emerges regarding native peoples. The in numbers in the study were small and thus the data must be treated cautiously. Nevertheless, there is a pattern of responses revealing substantial levels of dissatisfaction with and alienation from the civil justice system.

Third, based on preliminary analysis, individuals' attitudes toward the system seem to be related to the type of problems they experience. For example, those with tort problems (and most prominently motor vehicle) tend to register comparatively high levels of confidence. But those with professional service and discrimination problems tend to have more negative attitudes toward the system.

Footnotes to Chapter 7: General Attitudes About Access and Civil Justice

1. Economics Research Group Limited, Survey of Public Attitudes Toward Justice Issues in Canada (June, 1987 prepared for Department of Justice).
2. Ibid., 3.
3. Ibid., 4.
4. Moore, "Reflections of Canadians on the Law and the Legal System: Legal Research Institute Survey of Respondents in Montreal, Toronto and Winnipeg" in Gibson and Baldwin (eds.) Law in a Cynical Society? -- Opinion and Law in the 1980s (1983), 48.
5. Ibid., 48.
6. Department of Justice Study, footnote 1 supra, 2.
7. Ibid., 8-10.
8. Engel, "The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community" (1984), 18 Law & Society Review 551.

9. This idea was inspired in part by the growing body of feminist literature which seeks to explore the differences in socialization and approach to moral, ethical and legal issues that may exist between men and women. See, e.g., Gilligan, In a Different Voice (1982).
10. One of us in earlier research found that males tended to score higher than females on a test designed to measure propensity to claim about problems: see Vidmar and Schuller, "Individual Differences and the Pursuit of Legal Rights" (1987), 11 Law and Human Behavior 299.
11. For example, Morse and Lock, Perceptions of Native Offenders in the Criminal Justice System (1988), in press Department of Justice); Native People and Justice in Canada (Parts I and II, 1982), 5 Canadian Legal Aid Bulletin; Morse, "Native People and Legal Services in Canada" (1976), 22 McGill L.J. 516; Hathaway, "Native Canadians and the Criminal Justice System: A Critical Examination of the Native Courtworkers Program" (1984/85) 49 Sask. Law Review 201.

Chapter 8

Another Source. A Qualitative Study

Sometimes survey data is criticized on the grounds that in a relatively brief telephone interview people do not give complete answers to questions or give only superficial ones. We would argue that the survey data presented in the preceding chapters is not as susceptible to this criticism since much of it asked for information descriptive of events that occurred. Nevertheless, we conducted an additional study intended to flesh out responses to questions that were asked in the survey.

Our research strategy was to conduct a series of "focus" groups. In these focus groups between four and six persons who had been participants in the survey were invited to come together to discuss matters relating to the Ontario legal system and their experiences as persons who had been confronted with a justice problem. The discussion leader for the groups provided a framework for the discussion but otherwise persuaded the participants to speak in their own voices. A total of six focus groups were conducted in Toronto. The participants varied in their backgrounds and in the problems that they had experienced. Discussions lasted between one hour and one hour and thirty-five minutes. With the permission of participants the sessions were observed through a one-way mirror by the authors of the report and tape recorded.

A number of themes emerged from the focus groups: attitudes toward the legal system; knowledge of the system and of legal rights; reaction to "non-legal" methods of dispute resolution;

and attitudes toward lawyers. Each of these themes is discussed below. We have used first name pseudonyms to protect the identity of the focus group participants.

A. Attitudes Toward the Legal System

Reaction toward the legal system ranged from toleration of it as a necessity to outraged hostility. Words like "formal", "intimidating" and "complex" were used to describe it. The most stinging criticisms seemed to come from those in domestic disputes. From these persons there was heated denunciation of the adversarial system and how it seemed to heighten tensions between the parties. One participant, Susan, described, how it "locks you in an emotional state". However, positive comment was made about the enforcement mechanism recently established to aid in the collection of delinquent support payments. A number of individuals were aware of this, endorsed it, and hoped it would alleviate many problems.

A number of people indicated their confusion in dealing with a legal problem because there was no central office where one could inquire concerning the problem and how to react to it.¹ One exception, which was mentioned approvingly, was the Law Society's "Dial-a-Law" program which a number of people believed gave at least some basic information about what to do about legal problems. There were also strong complaints concerning the delays in dealing with legal problems, although individuals sometimes could see utility in delay given their particular problem. For example, Hannah, whose child was born with birth

defects allegedly caused by medical malpractice, believed that a certain amount of delay might be necessary before resolving the case in order to determine with confidence the extent of the infant's injuries.

People tended to see the system as structured to be fair but capable of manipulation. A repeated theme was that those with greater resources and more knowledge of the system are able to dispute more effectively.² These attitudes were voiced in the face of what appeared to be reasonably good knowledge concerning the existence of legal aid.³ There was support for legal aid even among those who were not using it.⁴ However, at least two people complained vigorously about the procedures involved in applying for it citing its de-personalizing and invasive aspects.

B. Knowledge of Legal Rights and of the System

People's basic knowledge of their rights and obligations and how they might be enforced by the system was not profound. A number of them seemed to have a basic sense of the process. For example, Betty, who had lived with a man and had a child by him, knew that the dissolution of their relationship and the responsibility of her co-habitee for child support was governed by different laws and procedures than those concerning divorce. Those involved in formal civil litigation has a very simple idea of what discovery was and its purposes.

Yet, there were many examples of basic and fundamental ignorance that could have far reaching consequences. For instance Charlene, in the midst of a dispute with her landlord, seemed to

have the impression that the conflict itself might be heard in the criminal courts (though no charges has been laid on either side) and this seemed to strongly influence her belief that she required a lawyer. Ellen seemed truly amazed that paying a traffic ticket was an admission of the violation and was horrified when her license was suspended a short time later. Lana who, on the face of it at least, had been a victim of racial discrimination had no idea of the existence of the Ontario Human Rights Commission. Indeed, when the interviewer, some time later in the session, asked her if she knew of the Commission and what it did she responded with a flat "no".

Neither Hannah, the mother whose child had birth deformities and who was suing for a very large sum of money, nor Burt, who was also suing for a much lesser sum for another instance of alleged malpractice, apparently had been aware that they had any kind of claim until some third party told them. In Hannah's case another mother in a support group suggested the possibility. With Burt another doctor indicated that Burts initial medical treatment might very well have been negligent. Thus Hannah and Burt seemed to provide dramatic examples of how incidents (here of considerable magnitude) appear initially only as unfortunate occurrences until a process of transformation turns them into legal events encased in the language and ideas of law: victim, damages, liability, negligence and so forth.

Another impression that emerged was how strongly people's impressions of their rights and duties were influenced by their lawyers, a phenomenon substantiated by most previous studies.⁵

Individuals might have their own opinion on critical aspects of the dispute - willingness to settle, for example - but overwhelmingly what occurred and how it happened was shaped by the lawyer. At one level this may seem very obvious given the disparity in knowledge and experience between lawyer and client. But it does put at substantial risk the principle that a client instructs a lawyer and guides the relationship between the two. In reality, "lawyers shape clients' expectation and guide their reactions" would seem much more accurate.⁶ We will return to this point momentarily in the subsection on lawyers.

C. Alternative Dispute Resolution Mechanisms

The potential for other means to resolve conflict besides the courts and the adversarial system is much in the wind.⁷ Such mechanisms are argued to be cheaper, faster, more accessible and result in higher levels of satisfaction for those who use them. Whether all or any of such mechanisms in fact have these characteristics and in what circumstances is something which largely remains to be demonstrated. Nevertheless, curiosity about these possibilities is quite high and so we decided to ask individuals how they would respond.

It will be recalled that as part of the telephone questionnaire we asked respondents if they favoured some form of mediation or counseling as an alternative to resolution by a court. The support for that basic proposition was very high (total: "yes" 72%, "maybe" 11%, "no" 9%). That level of support was reflected in the focus groups as well. It seemed to be born of

people's apprehension about what they regarded as the complexity and adversariness of the system. Certainly, the strong impression conveyed was that, subject to a few exceptions, individuals had very little desire for a trial with a zero-sum solution as the preferred mode of dealing with a dispute, though there were exceptions. Jim, involved in a protracted fight with a contractor over renovations, seemed insistent upon a trial to establish how right he was and how the other party was in the wrong.⁸ Hannah, the woman with the claim for medical malpractice, saw a value in a judicial declaration that the hospital's procedures were inadequate so that they would be changed and other injuries prevented (at the same time she acknowledged and accepted the likelihood that the matter would be settled).

The strongest support for mediation came in the context of domestic disputes. People clearly wished to minimize the tension and trauma attendant upon the dissolution of a relationship. Such difficulties in their estimation were only exacerbated by the court and its adversary system which, as Susan observed, "locks you in an emotional state." Of course, none of this can be taken as an assertion that various alternatives will do what their proponents claim⁹ or that the individuals in their reactions were engaging in careful and detailed analyses of the advantages and disadvantages of any mode of resolving disputes. However, what did seem clear was that people's expectation of justice, or a satisfactory resolution to problems was not inexorably connected to what in a lawyer's mind might be the

dominant mode of resolving disputes: a trial before a judge in a court room. People seemed prepared to try other methods. What the results of those other methods would ultimately be remains, of course, arguable.¹⁰

D. Lawyers

On the whole, people spoke positively of their experience with specific lawyers. Whatever people may think of lawyers in the abstract, many are willing to speak positively, even at times glowingly, about how a lawyer has represented their interest. We will return to this point at the end of the section.

Most prominent among the individuals who were positive in their reaction to their lawyer was Hannah. After the birth of her child, her husband left, unable to withstand the pressures that went with being the parent of a deformed infant and another child. Hannah unable to work slid into welfare. She was enormously grateful to her lawyers for their handling of the claim on what amounted, it seemed, to a contingency arrangement. She felt they had been supportive, had prepared her well for her discovery, and had been in continual communication concerning the progress of the case.

Clear and effective reporting on the state of a matter seemed to contribute significantly to a positive impression of a lawyer. Pam, a single mother whose son had been charged with joyriding, had a legal aide lawyer with whom she was very pleased, a response influenced perhaps at least in part by the result since her son received an absolute discharge. In any

event, she had a firm recollection of the lawyer "keeping in touch." Lenora, when asked about lawyers, said she had used a "family lawyer" for years for any number of problems and had enjoyed a very satisfactory relationship with him. Susan, who characterized herself as a feminist, had found a lawyer who shared similar ideas and this had resulted for her in a very satisfactory handling of issues surrounding her divorce and child support.

People who expressed dissatisfaction chronically complained about their lawyer's failure to keep them advised of developments and an unwillingness (or inability) to respond to questions they posed about their problems. Karl, who had been involved in a number of motor vehicle accidents for which he had been charged, ultimately turned to a paralegal who he believed was more responsive, effective and cheaper than the lawyers that he had used in the past.

Individuals also complained of lawyers failing to discuss with them the cost consequences before proceeding or explaining clearly on what basis a client was being charged. This failure to explain costs before proceeding is reflected in the qualitative data. Of those people who contacted a lawyer 58% stated that the lawyer did not discuss fees before he or she began to act on the client's behalf.

The greatest single source of complaints appeared to come from one area: domestic disputes. No doubt reaction to lawyers was coloured by the emotional trauma such problems engender and by what seemed to be a generally hostile reaction to the

adversary system as a way of resolving such issues. Nevertheless, people with these problems complained about their lawyers. Of particular note were complaints about the high costs of the legal fees. People seem convinced that lawyers were paid too much for what they did. Further, lawyers were accused of being patronizing to those with less formal education and of being chauvanistic towards women, although at least one man thought that women lawyers handling domestic strife were sometimes particularly hard if their clients were women and the opposing client was male. Again, we are not vouching for the validity of these complaints but are making the point that in the range of problems, people involved with domestic issues clearly were among those most dissatisfied with their entire experience with the justice system and lawyers.

Nevertheless, the reaction of many individuals to specific experiences with particular lawyers was positive. How can these findings sit with a popular image of lawyers which seems so negative and to which even lawyers, in reflective moments, admit? Consider the comment of Yves Fortier, a former President of the Canadian Bar Association a few years ago: "We are perceived as tending to overcharge, to be slow, to be uncommunicative and obtuse in our dealings with clients."¹¹

In fact what appears to be the case is that there are two images of lawyers. One, quite negative, constructed at a general and abstract level and another, more moderate and often positive, based on actual experiences with lawyers. This dual image is borne out by other studies.¹² A study of respondents in Mon-

trepreneurial, Toronto and Winnipeg concerning the law and the legal system in 1980 asked a series of questions concerning lawyers.¹³ Responses to a list of potential grievances resulted in a stinging indictment of the profession:¹⁴

When asked to comment on the remarks about the profession gathered from interviews in the pilot work, respondents agreed with the following litany of complaints: that higher paid lawyers get better results for their clients; that lawyers are always finding loop-holes to get around the law; that lawyers get too many guilty people off; that people have to use lawyers more often than is really necessary; that lawyers do not work as hard for poor clients as for clients who are rich . . .

Yet, when asked to react to their specific encounters with a particular lawyer the reaction was in strong contrast:¹⁵

Based on their most recent personal experiences, respondents generally gave lawyers high marks on the quality of their work. They saw their lawyers as being prompt in taking care of matters, showing interest and concern, being honest, explaining matters fully, keeping them informed of progress, and paying attention to their concerns.

All this suggests that reaction to lawyers and their image may be a more complex phenomenon than is often portrayed. Lawyers may be more successful in their overall image if they tend to emphasize factors about themselves and lawyering which focus on how services are, in fact, delivered satisfactorily and what makes a successful lawyer-client relationship.¹⁶

Footnotes for chapter 8.

1. This reaction seems consistent with evidence elsewhere that "lawyers were not doing enough to inform the public of how the legal process works and of the types of legal services available": see Moore, "Reflections of Canadians on the Law and the Legal System: Legal Research Institute Survey of Respondents in Montreal, Toronto and Winnipeg" in Gibson and Baldwin (eds.) Law in a Cynical Society? - Opinion and Law in the 1980s (1983), 53.
2. Indeed, some seemed to provide an excellent, although unwitting, precis of some of the main points in Galanter's classic article; Galanter's "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974), 9 Law & Society Review 95.
3. However, in another Canadian study respondents expressed low levels of familiarity with the legal aid plans, as such, in their respective provinces: see Environics Research Group Limited, Survey of Public Attitudes Toward Justice Issues in Canada (1987, Department of Justice) 35-37.
4. Ibid., 35: "Most Canadians (60 percent) think legal aid is

a service which should be available to low income Canadians only. . . . support for legal aid to low income people increases to at least 80 percent when specific circumstances are discussed."

5. Sarat and Felstiner, "Law and Strategy in the Divorce Lawyer's Office" (1986), 20 Law & Society Review; Felstiner, Abel, Sarat "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming, . . ." (1981), 15 Law & Society Review 631, 645-46; McCauley, "Lawyers and Consumer Protection Laws" (1979), 14 Law & Society Review 115; but compare Cain, "The General Practice Lawyer and the Client: Towards a Radical Conception" (1979), 7 International Journal of the Sociology of Law 331.
6. Felstiner, Abel, Sarat, ibid, 646:

[Lawyers] furnish information about choices and consequences unknown to clients; offer a forum for testing the reality for the client's perspective; help clients identify, explore, organize, and negotiate their problems; and give emotional and social support to clients who are unsure of themselves or their objectives.
7. For example, Goldberg, Green & Sander, Dispute Resolution (1985), reviewed critically by Merry (1987), 100 Harv. L. Rev. 2057.
8. Jim seemed to typify a reaction described by Merry and Silbey in their examination of disputing in three small American neighborhoods: Merry and Silbey, "What Do Plaintiffs

Want? Re-examining the Concept of Dispute" (1984), 9 The Justice System Journal 151. At 153, in explaining why individuals do not use alternative methods of dispute resolution as much as their proponents had hoped for:

[T]he grievant wants vindication, protection of his or her rights (as he or she perceives them), an advocate to help in the battle, or a third party who will uncover the "truth" and declare the other party wrong. Observations suggest that courts rarely provide this, particularly to plaintiffs in interpersonal cases, but inexperienced plaintiffs do not know this.

9. For example, the present Attorney General and his expectations for alternative methods: see, Gottlieb, "Our Legal System Too Expensive, Needs 'Radical' Reform: Ont. A.G." The Lawyers Weekly 15 May 1987, Vol. 7, No. 3, 1.
10. For example, the experience in the United States is that people, given the choice concerning minor interpersonal disputes, prefer court resolution; see Merry, footnote 7 supra 2062. She explains their reluctance by discussing Silbey's and her study of neighborhoods: see footnote 8 supra. At 2063 she observes:

They were not initially litigious, in the sense of being eager to run to court, and seemed quite reluctant to take a step that they saw as serious and likely to escalate the dispute significantly. By the time a dispute is serious enough to warrant outside intervention by a public third party, the disputing parties have often come to view the problem in terms of rights and principles and no longer want the opportunity to discuss the dispute informally. Naive users of the courts typically expect that the law exists to protect them and that it will be applied to their problem firmly and powerfully.

11. Yves Fortier, "The Canadian Bar Association - A Reply" in Gibson and Baldwin (eds.) Law in a Cynical Society? - Opinion and Law in the 1980s (1983), 195.
12. For example, Yale, "Public Attitudes Towards Lawyers" An Information Perspective" in Trebilcock and Evans (eds.) Lawyers and The Consumer Interest (1982), and Tomasic, "Cynicism and Ambivalence Towards Law and Legal Institutions in Australia" in Gibson and Baldwin footnote 11 supra, 89:

[C]lients who have regular contacts with their lawyers seem to have less cynical attitudes towards lawyers and the legal system, suggesting either that lawyers serve to moderate or defuse critical attitudes, or that clients may obtain insights from such contact which lead them to change or moderate their attitudes.
13. Moore, "Reflection of Canadians on the Law and The Legal System: Legal Research Institute Survey of Respondents in Montreal, Toronto and Winnipeg" in Gibson and Baldwin, footnote 11 supra 41.
14. Ibid., 53.
15. Ibid., 52 and see Yale, footnote 12 supra, 49:

The majority of respondents in the studies under consideration appeared satisfied with the service they had received from lawyers. Two-thirds of the Canadian Gallup Poll sample indicated that their experience with lawyers generally had been good, while only 7% reported that their experience had been poor. Similarly, over 80% of respondents either American or British surveys indicated that their experience with lawyers generally had been good, while only 7% reported that their experience had been poor. Similarly over 80% of respondents in the American and British surveys indicated that they were extremely or fairly satisfied with the

service received. Ontario clients for the most part (71%) felt that their lawyers had done a competent job; about two-thirds indicated that their lawyer had done everything possible on their behalf.

16. Curran, "Surveying the Legal Needs of the Public: What the Public Wants and Expects in the Lawyer-Client Relationship" in Gibson and Baldwin, footnote 11 supra, 107, 109: "The four most frequently mentioned qualities that people say they look for in selecting a lawyer are commitment, integrity, competence, and fairness and reasonableness of fee."

Chapter 9

Conclusions and Implications

A. General Findings

1. Over the three year period between January 1985 and December 1987 approximately one in three Ontario households reported one or more serious civil problems. There were some differences in the frequency of experienced problems as a function of demographic characteristics associated with households: younger, better educated, and higher income households reported more problems than older, less-educated, lower income households (Chapter 3).
2. Levels of claiming varied substantially with the type of problem (Chapter 4).
3. Disputing strategies and the use of third parties varied substantially depending on the type of problem (Chapter 4).
4. Satisfaction and Outcome varied substantially depending on the type of problem (Chapter 4).
5. The data on why people do not seek compensation for problems are far from definitive. Nevertheless, they do suggest that the reason is not that they have less faith in the legal system, feel less competent or feel more victimized. The data do not suggest substantial differences in compensation seeking between households in various levels of the socio-economic strata. For those who sought outside help from lawyers or other agencies

there was a tendency to see the claim potential as less meritorious or less recoverable (Chapter 5).

6. In the context of the problems raised in this study (Chapter 7):

- a. A significant number of people indicated that they feel that they are victims of both business and government.
- b. A substantial majority think that the cost of the system is too high and that it takes too long.
- c. A substantial majority think that the justice system is fair and that tax dollars used to support it are a good investment.
- d. A majority think that in the context of the problems discussed in this study they have at least some knowledge of their legal rights.
- e. A substantial majority indicated that an attempt should be made to resolve disputes without engaging court proceedings.
- f. The number of native peoples in the study was small and, therefore, the data must be used cautiously. Nevertheless, there is a pattern of responses concerning attitudes revealing substantial levels of dissatisfaction with and alienation from the civil justice system.
- g. People's attitudes toward the system can vary significantly depending on the type of problem they experienced.

B. Lawyers (Chapters 4, 6 and 8)

Drawing on our qualitative and quantitative data and some other studies, two different points about lawyers emerge

1. At a general level lawyers do not enjoy a good reputation (Chapter 8).
2. However in the context of a particular problem the reaction to lawyers can be quite different. Those people who did not consult a lawyer regarding a claim indicated little animus towards them, only a belief that the problem could be handled in another way. For persons who contacted a lawyer some amount of free advice seemed to be given and for those who were charged the majority thought the fee was about right although this reaction varied substantially depending on problem type. Many in the focus groups spoke very positively about their experience with lawyers; those who did complain focussed on cost, not being kept informed and being treated in a condescending manner (Chapters 6 and 8).

C. The Civil Justice Systems

It may be much more productive to analyze and discuss the civil justice system in terms of various problems rather than attempt to make global assessments and generally applicable responses. We make this statement because of, on the one hand, the wide variation among types of problems and, on the other hand, the consistency within types of problems. In Chapters 4, 6, and 7 we illustrated this point by contrasting

torts (in particular problems involving auto accidents) -- where the reaction was comparatively positive -- with problems involving consumer problems (in particular involving professional services) and discrimination -- where the reaction was generally negative. We do not mean to suggest that only certain categories like auto accidents, professional services and discrimination should receive attention. Rather they have been used to illustrate the variation that can be found among categories and, by contrast, the consistency within them. Those with auto accident problems are more likely to get what they claimed, be satisfied with the result, be satisfied with their lawyer's fees, not think the process took too long, not think the cost was too high and to have a more positive attitude toward the civil justice system. More or less, the opposite is likely to be true regarding those points for those with discrimination and professional services problems.

Appendix

Specific Grievances and How They Were Clustered:

- \$1 - indicates grievance involved \$1,000 or over.
- For brevity not all examples suggested to respondent are listed.

Tort

Auto accident \$1; work injury \$1; other problem or damage (excluding auto or work injuries) \$1; accused of injuring anyone or of damaging someone else's property \$1.

Consumer

Problem with item worth \$1, e.g., car, boat, real estate; problem over \$1 with services, e.g., health club, homebuilder; problem with professional, e.g., doctor, lawyer, undertaker involving \$1.

Debts

Problems collecting money of \$1 owed to household member by employer or by someone with loan or from benefit program; disagreement about debts of \$1 concerning money owed by household member, e.g., bank, credit card, mortgage.

Government

Problems collecting benefits, e.g., Canada Pension, Old Age Pension, Welfare, tax refunds; problems with immigration; problems obtaining services from local government or any problems with government agency; problems with government agency claiming household member owed it \$1, e.g., government loan, taxes, overpayment.

Discrimination

Any problems on grounds such as race, ethnicity, sex in areas such as work, education, buying or renting housing.

Invasion of Privacy

Any significant invasion of personal privacy by, e.g., public agency, government agency, employer, bank, finance company.

Landlord

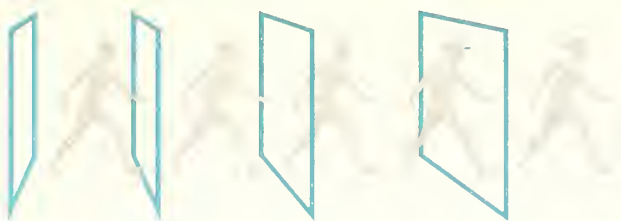
Any serious problems with a landlord, e.g., rent, eviction, condition of property.

Divorce/Separation

Serious problem with terms of divorce or separation in a marriage or common law relationship, e.g., property division, visitation, or custody.

Other

Any problems involving \$1 not already asked about.



Conference
on Access to
Civil Justice

Congrès sur
l'accès à la
justice civile

**National Conference on Access to Civil Justice
June 20-22/88 - Inn on the Park, Toronto**

A lawyer's view of access to justice

by Harvey J. Bliss, Q.C.

President, Canadian Bar Association-Ontario

Executive Summary

A LAWYER'S VIEW OF ACCESS TO JUSTICE

Harvey Bliss begins by reminding us of the necessity to maintain a good justice system, regardless of the cost. Indeed he contends that gross under-funding and public apathy are the twin threats to the legal system. The present system is structurally sound and, although there is a continuing duty to seek better and cheaper methods, will work effectively if properly funded. To reinforce his point, he explains different facets of the justice system -- legal aid, legal insurance, court jurisdiction, alternative dispute resolution, paralegals, contingency fees, and the like -- and suggests how they can be used and improved to make the legal process more accessible and just.

A significant part of the paper deals with the empirical study, as described by Bogart and Vidmar, which was commissioned for this conference. He is of the view that "full confidence cannot be placed in the results" and he charts some of the technical difficulties he perceives with its design and implementation. Nevertheless, he does think that the results are by and large encouraging. Finally, he urges lawyers and the public to work together to make the present system the best and most efficient it can be.



THE PUBLIC NEED

First quotation, from the 1986-7 Report of the Law Reform Commission of Canada:

"The process of law reform is too important to be left to lawyers alone. Law touches the lives of everyone; it is therefore the business of everyone."

Second quotation, from a study for the LRCC by Dean Martin L. Friedland "Access to the Law":

" The state has an obligation to ensure that its laws are available in an understandable fashion to laymen."

" Why should citizens have access to the law? The simple answer is that good citizenship requires it. Citizens should be able easily to ascertain their rights and obligations."

" A basic assumption of our legal system is that the citizen knows the law...."

" In an increasingly complex society, citizens also need to have access to the law in order to plan their affairs - financial and domestic, at home and at work.

Not only is it in the interest of the layman to have access to the law, but the legal system itself benefits from informed comment by the layman, comment which obviously cannot be informed without some knowledge of the law."

An editorial in the Belleville Intelligencer of February 12, 1988, in suggesting the provincial government should have widely distributed a summary of the Zuber Report, continued:

"Involved as our democratic society should be in such matters, the Mr. Justice Zuber report is hardly best-seller material at any price."

A very exciting conference on Legal Information in Ontario Public Libraries was held at Osgoode Hall Law School on April 14, 1988. A research study for that conference demonstrated a public thirst for knowledge of the legal and justice system: some 8% of calls to public libraries, perhaps more, are for legal information. That is a staggering statistic. The libraries need the materials and training to satisfy that demand.

The Dial-A-Law system, founded in Ontario by the Ontario Branch of the Canadian Bar Association and the Law Society of Upper Canada - and matched in other provinces - received 125,000 calls last year.

Obviously the public is interested - in at least two senses of that word.

The vital importance of this conference is not just the opportunity it provides to seek solutions to some of the major problems facing the justice system; more, it is a public conference, at which both lawyers and non-lawyers are present to contribute to those solutions.

We are grateful to the Attorney-General for arranging it.

PUBLIC DESIRE

A 1987 survey of Public Attitudes Toward Justice Issues in Canada for the Department of Justice by Environics Research Group Limited found that 96% of Canadians believe it is important to maintain a good justice system, regardless of the costs, and 80% agree that the justice system is a relatively good use of taxpayers' money.

THE PROBLEM

The following indictment is found at page 58 of Mr. Justice Zuber's 1987 Report of the Ontario Courts Inquiry:

"[T]here is a chronic lack of funding. The budget for the administration of justice in the province of Ontario in the last 20 years has made up less than 1% of the government's total budget. Since 1969, when the provincial government took over the financing of the administration of justice, the percentage of the total government budget allotted to the justice system has declined by one half."

I am told the Attorney-General has been successful in obtaining an increase of his budget by one-third. That would be to 2/3 of 1%, still 1/3 below 20 years ago. We have to sympathize with an Attorney-

General going to Management Board in competition with Health, Education and Highways.

Harold Levy is a member of the Toronto Star's editorial board. His column of February 23, 1988, was headlined "Lack of funding is root cause of court delays."

The twin threats to the justice system - both criminal and civil - are:

1. Gross under-funding;
2. Public apathy.

Accused criminals are going free under the Charter since they are not being brought to trial in time. The lack of courtrooms, notorious in Brampton, Mississauga, Scarborough and Ottawa, underpaid Crown Attorneys and reduction of court room security staff are current examples of the deaf ear of Management Board. While these are threats to criminal justice rather than civil, they are symptomatic. Worse, cutbacks are being instituted without consultation with the Chief Justice, the Bench, Bar and public.

The situation has become intolerable. It cannot continue.

The present Government has inherited a problem not of its making through years of neglect. It has now had time to start correcting the problem. Notwithstanding the determination to increase spending on court houses, the basic problem remains.

Justice is not sexy: it does not buy votes. Not yet. Without a public constituency the Attorney-General is going to lose every fight before Management Board where the issue is justice spending versus health or housing. Carried to the extreme it will mean locking the court house door.

SOLUTIONS

We must create a public network of citizens and groups concerned for the justice system. Your groups can form part. Every service club can form a justice or law reform committee. Not only must we mobilize existing groups, new groupings of unorganized members of the public must find a voice.

We must be prepared to lobby MPPs in their ridings, flood them with letters, keep up the pressure all year round, demonstrate the public desire that justice receive its proper share of funding.

We must also, of course, continue to seek better, cheaper methods. We are blessed in this province and country with a fair system of laws and incorruptible judges. The system can work well if properly funded and, no doubt, can be improved. It is unacceptable to consider the search for improvements as an excuse to cut funding.

THE PERFORMANCE

The Canadian Bar Association-Ontario is dedicated to public service. We represent 15,000 lawyers, law students and judges in Ontario. We are counsel to the public on law reform issues in dozens of submission to governments every year. We have 80 sections and committees in Ontario working on matters of public as well as professional interest. Many are the subject of this conference and are referred to below. Lawyers devote tens of thousands of volunteer time every year in the public interest.

May are also working in many other legal organizations as well as public interest groups such as ARCH, the Public Interest Advocacy Centre, the Environmental Law Association, the Civil Liberties Association and Legal Aid clinics across the province.

A strong and independent Bench and Bar are the public's best defence against not only governmental tyranny but governmental blundering. We are dedicated to prosecuting that defence forcefully and vigorously.

PUBLIC LEGAL EDUCATION AND INFORMATION

Public knowledge is a cornerstone of the justice system. Many institutions and organizations, governments and lawyers associations are providing a vast amount of legal information to the public on a

voluntary basis. A detailed current analysis prepared by the Canadian Bar Association-Ontario is in the CBAO kit.

CBAO is delivering PLEI through 3 of its subgroups:

- Public Legal Education Committee
- Law Day Committee
- Young Lawyers Division

A recent survey by our Young Lawyers put public education at the top of its list. It is refreshing to see young lawyers still dedicated to public service. Lawyers are prepared to help in providing the material. The problems are delivery and funding. Further cooperation by the media and greater use of libraries will assist in delivery. Only government can fund a programme such as library materials and training.

LEGAL AID

Legal aid is generally accepted as an integral part of our justice system because it enhances access to justice and equality before the law to those people who cannot afford to pay some or all of a lawyer's fee and associated costs. Almost three years ago, Ontario's Attorney General, Ian Scott, described legal aid as "a fundamental bulwark of our way of life, a critically important part of our social fabric and an essential element of the social justice which holds us together as a society despite wide divergences in economic well-being," and he noted that "if we

allow economic factors to deny access to legal advice, we create second-class citizens" and "it is simply impossible to have access to the judicial system without appropriate legal advice and assistance."

Barriers to obtaining legal aid in appropriate circumstances become barriers to access to justice. In Canada access to legal aid varies widely. Both financial eligibility guidelines and subject matter coverage differ depending on where you live in Canada. While some provinces are meeting with great success in expanding or enhancing services and access to legal aid, in other provinces subject matter coverage is being reduced or eliminated in the name of fiscal restraint. In some provinces the legal aid constituency does not have a strong enough voice to even maintain the status quo in subject matter coverage. One province just recently announced an elimination of all civil legal aid coverage. Other provinces have similarly eroded the scope of subject matter coverage.

How do we enhance access to justice through legal aid for those without financial means? First and foremost, we should speak out in support of broadening the scope of legal aid subject matter coverage to cover essential legal services for qualifying individuals; these include legal problems which put in real jeopardy an individual or his/her family's liberty, livelihood, health, safety, sustenance or shelter. Except for criminal cases, child welfare cases and other cases which involve the state as the opposing party, a secondary test should be applied to ensure that a legal aid case is one with which a prudent litigant would proceed privately.

Essential legal service coverage for qualifying individuals in civil cases should include the following areas of law:

- Family law matters, including child welfare matters where the state is involved as a party, custody and access, independent representation for children who have an interest apparently separate from the parents or guardian, proceedings to prevent or relieve domestic violence, maintenance proceedings, divorce and nullity proceedings, division of matrimonial property, paternity and adoption;
- Administrative law matters which present real jeopardy to liberty, livelihood, health, safety, sustenance or shelter including worker's compensation, immigration, welfare, unemployment insurance, housing, pension and human rights cases;
- Other civil matters presenting real jeopardy to liberty, livelihood, health, safety, sustenance or shelter, such as foreclosures, residential tenant evictions, actions against uninsured motorists, Charter proceedings and others where a person or group of persons is unable to retain counsel and the matter cannot be fairly resolved by other means; and

- Public legal education and advice should be available for all members of society in order for them to know, respect and exercise their legal responsibilities and rights, to recognize and prevent legal problems and to help themselves to resolve legal problems without or with limited need for lawyers and courts.

Some provinces are much closer than others to providing these essential legal services through their legal aid plans.

We must speak out against reductions in legal aid funding and other supply/demand oriented restraints; supply-side restraints include reduction in numbers of staff lawyers, reductions/freezes/holdbacks and reduction of private lawyers certificates. Demand-reducing restraints include reducing subject matter coverage, suspending intake of new clients, freezing income guidelines for eligibility and imposing user or contribution fees. One province attracted a lot of attention last year with the implementation of a \$60 contribution fee payable by all legal aid applicants, with waivers automatic for those on social assistance and discretionary for other hardship cases. Other provinces have either considered or implemented these user or contribution fees. The results of an evaluation in one province found that these fees are more effective as a deterrent to applicants than they are as revenue generating devices; there was a clear announcement effect with an immediate and dramatic decline in applications followed by an overall decline in applications of 15% the following year. Only 10% of legal aid clients actually paid the fee.

What is important to remember is that legal aid is not an expensive social experiment, affordable only in times of economic growth. Rather, it is the expression of the basic, democratic principle of the protection of the rights of individuals; to limit expenditures in the name of restraint suggests an attempt to strip individuals of the means to assert their legal rights. As well, far from being a drain on public revenues, legal aid is an essential and cost effective element of the administration of justice. The cost of court proceedings prolonged by unrepresented parties is unquantifiable. Deserted mothers and children, unable to obtain enforced maintenance orders, invariably end up on welfare. Those who feel ignored or mistreated by the law are more likely to disrespect it in the future, creating more victims and greater expense.

The legal aid system is administered to a great extent by volunteer lawyers. Lawyers working under it accept reduced rates. In addition to official legal aid, every lawyer does non-paying pro bono work for people who cannot afford a lawyer.

LEGAL INSURANCE

One answer to legal costs is insurance. The CAW plan is up and running and providing a lot of coverage.

The rationale of Legal Service Plans (which come in many shapes and sizes) is to provide access to relatively basic legal advice and services (e.g. making a will, buying a home, separation agreement) at fees below what might otherwise be "usual and customary", driven by the purchasing power of relatively large groups. The concept should be particularly attractive to the overwhelming majority of Canadians who are neither rich, at one end of the scale, nor have access to Legal Aid at the other.

In Ontario, in addition to consumers and to those who provide or seek to provide such Plans, there are two major players: the Law Society of Upper Canada, which regulates lawyers and looks after the public interest and CBAO which promotes the interests of consumers as well as of its members. CBAO maintains an active Standing Committee whose advice is frequently sought by lawyers across Canada and by organizations considering the implementation of Legal Service Plans and which has provided speakers on the topic, not only in Ontario, but also in Newfoundland, New Brunswick, Québec and Alberta. An active liaison is maintained with other lawyers and notaries across the country. CBAO has:

1. submitted a brief to the Law Society in September, 1985 (just prior to commencement of the operations of the Canadian Autoworkers Plan);
2. jointly with the Law Society, engaged professional consultants to review the history of similar plans in the United States, Australia and Europe, and to make recommendations (the Report was received in 1986);

3. in September of 1986, through Council (its governing body, representative of lawyers throughout Ontario) unanimously recognized Legal Service Plans as a significant social development which should be supported and encouraged;
4. endorsed the concept of an "open" panel of lawyers. This signifies that a member of a Plan may select any lawyer of his or her choice and not just a lawyer who has agreed to work for the Plan either as a full-time "in-house" lawyer or as an outside "co-operating" lawyer;
5. constantly monitored developments and provided information and advice, when approached;
6. just last month formally endorsed the framework and concepts of a commercially organized telephone access plan to become operational next year. The endorsement is for a trial period of one year and gives CBAO the right to monitor the financing and working of the plan and to approve of all promotional and other literature.

Initially there was a lot of lawyer resistance to the CAW plan. The Bar Association cut through much of that and has produced an atmosphere of general support for these plans.

Other unions will be bargaining for similar plans and more private plans will come forward. CBAO has offered to review any proposed plan, free, and give its suggestions.

In summary, CBAO is at the forefront of the Legal Service Plan scene in Canada and will continue to ensure that, in this area, access by the public will increasingly be facilitated.

The CBAO committee chair is Garth Manning, who is now probably the country's leading expert on legal insurance, and who you'll be hearing from later.

ZUBER AND BEYOND

The Zuber Report had many wonderful recommendations and some major flaws. I gave it an 8.5.

Justice Zuber recognized the need for greatly increased funding. He recommended regionalization of the courts, i.e. more local justice, which is long overdue and which we applaud.

He recommended a strange form of merger of supreme and district courts, by phasing out district court and leaving the present district court judges in limbo. We urge immediate merger. A 2 level, regionalized court will make much better use of judge and court time and reduce delay and expense.

However the Attorney General is proceeding to a Strategic Plan for instant merger of administration of the present 3 levels of courts,

without consultation with the judiciary, legal profession or public. These unilateral steps must stop.

Justice Zuber concluded that 100 judges would be sufficient to staff the new superior court following abolition of district court. His conclusion was based on wholly erroneous statistics.

He recommended a greatly expanded provincial court, with exclusive family jurisdiction. We believe this will demean family litigants and urge unified family court on the superior court level. Few matters touch people's lives more closely than family law issues.

We distrust the transfer of jurisdiction from federally appointed judges to provincially appointed judges. While both the federal and provincial governments are proceeding to improvements in the appointment process, with public participation, provincial appointees still feel limits on their independence.

The public has more confidence in federally appointed judges.

CBAO has concerns that Zuber's proposal to transfer exclusive family and landlord and tenant jurisdiction to provincial court will face constitutional problems, quite apart from Meech Lake considerations.

I also question why a province would want to voluntarily assume a transfer of hundreds of millions of dollars of costs from the federal

government. If the Attorney-General has that kind of money floating around, I have better uses for it.

"ALTERNATE" DISPUTE RESOLUTION

Beyond Zuber? Zuber recommended voluntary ADR. All useful alternatives should be available on a voluntary basis.

Compulsory mediation is an oxymoron as has been pointed out by Professor Carrie Menkel-Meadows of UCLA.

The goal is dispute resolution, whether in Court or out. Some of the "alternate" techniques may be better used under court supervision, such as court supervised family mediation in some states and court supervised commercial arbitration in the U.K.

Better dispute resolution may be reached in court through greatly improved use of pre-trial.

The subject is of crucial importance. Access can be enhanced by making the justice system, both public and private, more cost efficient, more time efficient, more flexible and better understood. In all cases the objective must remain justice.

There is a vast array of dispute resolution methods which can be used both in and out of court. CBAO sets them out in an extensive separate paper which is in your kit.

I suggest the approach is not to look at the court system on one hand and "alternate" methods on the other. The goal is Better Dispute Resolution, as the Law Reform Commission of Canada is tending to approach it.

We propose the question be approached under 6 headings:

1. Goals of dispute resolution
2. Area and Techniques
3. Foreign Projects
4. Canadian Experience
5. Choices
6. Implementation

1. Goals

"Alternate" D.R. should not be regarded as a different system to process bodies in order to relieve court backlogs, undue cost and delay; or, worse, save governments the expense of providing a justice system.

We suggest the primary goal is better phrased: to develop improved ways of resolving conflict and repairing the damage caused by conflict

(suggested by the Network for Community Justice and Conflict Resolution)

2. Areas and techniques

The first question is to identify the areas and techniques of dispute resolution, both in and outside of court, and to define terms.

By areas we mean the fields in which disputes arise to be resolved and the techniques are those available to resolve them.

In this respect the question arises whether to use a horizontal or a vertical approach. "Arbitration" means different things in the fields of labour, commercial, matrimonial and it is therefore not useful to look at arbitration as such but rather to look at labour, commercial and matrimonial separately.

3. Foreign Projects

There is more literature available on trials of various alternate dispute resolution techniques in the United States and, to some extent, other countries. Foreign models are not to be followed slavishly but an investigation of foreign experience can save a great deal of work in

- identifying areas and techniques
- ascertaining what has and has not worked

- elsewhere - saving in time
 - saving in cost
 - produces justice - quality
 - consumer satisfaction
 - damages of compulsory ADR
- determining why

It has been found in the United States that some techniques which are superficially attractive don't work. Some ADR techniques do not in fact reduce court backlogs and cost. We need only borrow what is good.

As also has been pointed out by Professor Menkel-Meadows, what is sought is not just efficiency but quality; not just peace, but justice (both from address to the CBAO Institute February 1988).

4. Canadian Experience

The more challenging and important job is to identify projects under way already in Canada. Some are quite exciting. The CBA's Windsor-Essex Mediation Centre taught us a great deal. Since there is less literature available, although Canadian publications are growing rapidly, most of it can only be collected as living history.

The Canadian Bar Association - Ontario has started the process and reports on the results in its paper.

It is crucially important to identify what actually works in the Canadian context.

There may be constitutional problems associated with compulsory ADR. While we encourage the enhancement of dispute resolution techniques in court and voluntary ADR, we have grave concerns with any suggestion that a party may be denied access to court is desired.

5. Choices

A great deal can be done to improve the settlement process within the present Court system. We have sufficient experience in pre-trials to believe that early pre-trial and the use of more experienced pre-trial personnel can be instituted immediately without further study.

Mediations and arbitrations are proceeding and will continue. There is an open question whether the systems should be independent or court annexed. A rapid growth in experimentation with alternate techniques is under way.

We suggest particular attention be given to the multi-door technique. It might be possible to house not only all courts in one building, as the Zuber Report recommends, but all dispute resolution resources - at least the information if not the facilities.

We can envisage the court house staffed with trained intake workers who can receive members of the public, identify their problems and

suggest resolution either in court or by an alternate technique under court supervision.

Canadians rightly trust their courts and judges. Our justice system has spent centuries in developing a just system of dispute resolution. That system is in constant evolution.

No dispute can be resolved until the facts are on the table. Any system of dispute resolution must provide a method for determination of the facts, either voluntarily or, if disclosure is refused, compulsorily. The courts have evolved techniques of compelling disclosure which can be of assistance in an alternate proceeding: again, a marriage is possible.

We must not be stampeded into premature decisions, based on the theory the court system does not work, by allegations of a "litigation explosion" or "insurance crisis", neither of which is supported by the facts.

6. Implementation

Dispute resolution is being improved constantly, both by improvements in the court process and use of alternate techniques. While law school and other courses are now being given, greatly enhanced education is necessary.

Many decisions will be necessary. Will one or more new professions be created? The application of many of the considerations which apply to licensing both lawyers and paralegals will have to be considered.

ADR techniques may not be suitable in the same precise model to every province and region. What may work in Toronto may not work elsewhere, depending on the resources available. Consideration should be given to adapting models to different conditions.

APPOINTMENTS - JUDGES, TRIBUNALS

The CBAO committee on the provincial judiciary is examining the Attorney-General's proposal for a new process to appoint provincial court judges. The newly proposed federal scheme is also largely commendable, although subject to further improvement.

Until now there has been little real input from the profession and none from the public. What input the Bar did have was reactive, not pro-active. Political patronage, both federal and provincial, has always been a significant factor in some appointments.

It has been even more of a factor in appointments to tribunals. The chairperson of the CBAO committee on appointments to tribunals, Noel Bates, will be speaking to you later.

PARALEGALS

Supervised paralegals, working in law firms, help to bring down costs. Every law firm, to be efficient and competitive must employ paralegals as law clerks or senior secretaries who, together with the lawyer, form an integral team in the delivery of legal services.

A new phenomenon, the "unsupervised" paralegal is something different. Is the public served by unsupervised paralegals?

Someone who was an experienced law clerk working within and as an integral part of the legal system may become an agent under certain Provincial statutes. Unfortunately, so could anyone else in Ontario, whether or not they have any experience at all.

At present there are no education or licensing requirements, no control whatsoever, no standards, other than prosecution for crossing the boundary and practicing law. Anyone can give advice. Any unqualified person can publish an ad and offer paralegal services. We hear stories of franchises being offered with one day training; of "immigration consultants" going to Hong Kong and charging \$50,000; of paralegals collecting fees in advance and doing no work in return. The public requires protection.

Many issues are multi-disciplinary involving not only questions of law but also questions of tax, business, ethics and regulatory matters.

With education and controls, are there jobs paralegals should be permitted to do to lower the cost to the public? The profession

welcomes the opportunity to assist in defining the role of unsupervised paralegals by breaking down law jobs and at the same time setting out in our opinion the safeguards society should demand for their delivery. CBAO has a large paralegal committee studying the question through 4 sub-committees:

1. Education

Continuing education

Training

Practical experience, grandfathering

2. Regulatory Design

a) Admission & discipline

Competence, standards

Licensing - permanent or annual, open or restricted to one area

Retesting

Incapability

Trusteeship

Ethics

Advertising

Termination, suspension, etc.

Criminal record, conviction

Nominal "supervision" by lawyer

Free Trade Agreement - entry of U.S. paralegal firms

b) Border disputes - jurisdiction

c) Supervision

Profession (Law Society)

Government (Ministry-Consumer Affairs)

Independent tribunal

Self

3. Consumer Protection

- a) Opinions, title certification, etc.
- b) Fidelity and negligence
 - liability insurance
 - bonding
 - compensation fund
- c) Trust accounts - clients' funds
 - retainer fees
- d) Fee assessment
- e) Undertakings

4. Tasks

The central question is to define the tasks unsupervised paralegals should be permitted to perform. The terminology must be determined to reduce disputes and abuse.

The approach should probably be both horizontal and vertical:

- horizontal, in the sense of looking at skills to be brought to all tasks;
- vertical, in that the key question is what finite tasks can be performed by non-lawyers with the requisite degree of skill.

Within the finite vertical task analysis there are inevitably questions of degree. What is a "simple" will, when is a divorce truly

"uncontested"? The public interest may require allowing non-lawyers to do simple tasks, even though lawyers are available to do the same tasks for the same fee.

Defining the range of permitted tasks will also determine the degree of supervision required. Some supervision, not now presently in place other than in a very narrow sense, through Law Society prosecution, is likely necessary even if permitted tasks are not expanded by legislation.

Corporate - incorporation, provincial and federal
 - share structure, classes
 - searches
 - annual minutes, returns
 - mergers and amalgamations

Real Estate - purchase and sale
 - mortgages - placing
 - discharge
 - renewal
 - certification
 - Planning Act, FLA

Estates - wills and codicils
 - estate and tax planning
 - surrogate court applications

Immigration consultants

Family Law - contested and uncontested divorces

- property settlements
- spousal and child support
- custody and access
- mediation, conciliation, arbitration
- agreements - minutes of settlement, separation, cohabitation, premarital

Provincial and municipal offences

Summary conviction

Small claims

Collection Agencies

Landlord and tenant

Labour Relations Boards

Unemployment Insurance

Workers' Compensation

Health Disciplines

Welfare

Other boards and tribunals

Before society throws away all the safeguards it has built into the legal system over centuries of experience, careful attention to detailing the specific tasks involved, identifying the skill and competence required to carry out the task, protection for the public and assurance of competence, must be identified so that a balanced business decision can

be made by society on the value or worth of the present protections over any alleged increased efficiency and alleged simple reduction in cost.

While our committee is continuing its work, two preliminary conclusions are emerging:

1. Many lawyers are prepared to do the same work at the same fee or less.
2. There are few "simple tasks". Legal training is required to cover all the bases and the public may be left unprotected by a simplistic paralegal approach.

Just as society demands protection from dishonest or incompetent lawyers, so too should society, once armed with the knowledge and appreciation of the quid pro quo involved in licencing unsupervised action by paralegals, claim the same protection from paralegals.

At present, with little or not training, supervision or protection to the consumer or ability to judge credentials of paralegal action, society is at risk.

Those are things the public must be satisfied about. It will be the public good which will determine paralegal development.

NO FAULT

We have no fault in Ontario - it's called workers' compensation. It gives you no fault coverage - if you are covered. However the awards are moderate, some say low. Boards were set up to ensure everyone would get something, without having to prove fault.

It has resulted in a monstrous system with many critics - huge bureaucracy, government doctors, borderline questions of coverage, low payments and employers complaints of high premiums. There are many cases where a widow could get 10 to 20 times the award if she were allowed to sue.

Would you have no fault not just in car accidents but hospital and medical malpractice, product liability, accidents on premises, nuisance cases?

New York has a form of no fault but does not propose to extend the scheme to certain "problem" lines. The New York Commission studying the question recommended a \$250,000 (U.S.) limit on awards for pain and suffering - higher than the limit we already have in Canada.

Would you go to a Board everytime you suffer harm, of any kind? You would be faced with a huge bureaucracy and cost.

New Zealand has a comprehensive no fault system which is technically bankrupt. Compensation is low and costs have soared. It can still take

years to get payment. There is still enormous litigation and lengthy appeals over whether an injury is an "accident". There remains the question if you are able to return to work - you are cut off if the bureaucracy says you are.

There are great complaints about the Manitoba system and the Québec system. No fault quickly becomes political - amounts set several years ago are now too low, the legislature will never keep up, an increase in premiums is ruled out by an election. There is also evidence that automobile accidents rose in Québec since the implementation of a no fault system.

Our no fault committee filed a brief with Mr. Justice Coulter Osborne who was appointed to make a definitive study on the pros and cons of a no-fault system for motor vehicle accident compensation in Ontario.

We submitted a four part analysis for the Commission focused on the need for better empirical data and an accurate study of the factors contributing to increased premiums. The purpose of the brief was to ensure that the Commissioner make recommendations designed to achieve premium affordability while retaining a system of reparation sensitive to the uniqueness of individuals. The Committee as well filed a supplementary brief with the Commission analyzing the proposed no-fault system suggested by the I.B.C.

The Osborne Report, in some measure, adopted the recommendations of CBAO. To quote the Commissioner:

"I have reached the conclusion that existing no-fault benefits ought to be substantially expanded ... and that the right to individual compensation in the tort system ought to be maintained."

The definitive answer is contained in the Osborne Report which rejects pure no fault. It supports an increased coverage in modified no fault which makes great good sense.

NO INSURANCE CRISIS, LITIGATION EXPLOSION

A lot of the hysteria for a magic solution has resulted from claims of an insurance crisis. There is none. The \$6 million Brampton case was reversed in the Court of Appeal and the assessment lowered.

The American program 60 Minutes investigated stories of an alleged insurance crisis in the U.S. and found they were phoney. Outrageous examples commonly given turned out to be simply not true.

Awards in Canada are for actual loss and expenses - lost wages, nursing costs, etc. General damages are seldom more than \$100,000 to \$150,000, not millions.

LAW REFORM

Law reform has become big business. Masses of detailed legislation, both federal and provincial, work their way up through departmental studies, Law Reform Commission Reports, Bills and Committee hearings.

The public is not organized to affect the process. Special interests address individual issues. A broader view on a broader range of issues does not get beyond the odd letter to an MP or MPP.

The Bar Association has Law Reform Committees and study groups making submissions, often on short notice. It often does not occur to governments to seek input until policy is decided.

We represent debtors and creditors, Crown attorneys and defence attorneys. We try to present an impartial, "public" point of view. How else can the public make its views known?

Presently organized groups, such as service organizations, each of your organizations, can form law reform committees, designate contact persons. We can form a network of groups and persons interested in public policy and the justice system.

The task is enormous, in terms of both organization and funding.

CONTINGENCY FEES

A contingent fee is a lawyer's fee that is usually but not always an agreed upon percentage of whatever amount the lawyer recovers for the client in a lawsuit. In Ontario, lawyers are prohibited from entering into this type of fee arrangement. The profession in Ontario is concerned about this issue and has recently undertaken a detailed study of the merits of this type of fee arrangement. No formal position has yet been taken by CBAO on the appropriateness of contingent fees in Ontario. Public perception would regard contingent fees as an access issue: a way to make it easier for low and middle income earners who may not qualify for legal aid to get a lawyer to act for them when they believe they have a legitimate claim but they may not be able or willing to assume the expense and risk of a lawsuit.

All of the other Provinces and Territories in Canada have permitted contingent fee contracts, in varying forms and with varying controls, for some years and in Manitoba's case for almost one hundred years. Their experience indicates that many of the fears that gave rise to the original prohibition of contingent fees are unrealistic in the current social and legal environment.

Many lawyers are opposed to contingency fees because they are concerned about the adverse public reaction that could be generated by what might be seen to be a grab for higher fees.

There certainly has not been any outcry amongst the public in the rest of Canada against contingency fees.

Most lawyers cannot afford to fund an action unless there is a reasonable chance of recovery or a bonus for success. Some law firms do take on cases that have merit when a client is without funds. It is hard for them to judge at the beginning of a case whether or not it is going to be ultimately successful and many times after hundreds of hours of work, a case is lost and the lawyer not only does not recover his fees but also may have to bear thousands of dollars of disbursements. At present the lawyer can't charge extra on the next case to cover that loss. A contingency fee contract would formalize that kind of arrangement.

Does the public in Ontario want the option of a contingent fee arrangement? Most lawyers who are involved in the areas of law in which contingency fees might be used would say that clients almost invariably prefer to avoid risk and would feel more comfortable knowing ahead of time exactly what their fee was going to be. I suspect that most members of the public would be in favour of contingent fees but there are possible abuses and only a carefully designed system would be effective and protect the interests of both the client and the lawyer.

If the public wants the option of contingent fee arrangements it should make its views known.

EMPIRICAL STUDY

The Conference planners had high hopes that the empirical study would yield further information. Unfortunately it appears the responses received were not reliable. It is not the case that "any survey is better than no survey". If funds are not provided for sufficient polling, or the questions are not framed to produce the needed information, full confidence cannot be placed in the results.

It was planned to interview 4,000 households by telephone. There were early concerns that the responses would not be representative in failing to reach those without phones, group homes and those who could not understand the caller. It now appears there are broader concerns.

Full technical documentation for the study and the analysis of the computer tables were not available at the time of writing. A summary of the survey design was provided by Canadian Market Research Ltd. via telephone.

Sampling

The design of the telephone survey employed the use of a two-stage stratified cluster sample with a modified form of random digit dialing. The province was stratified into three regions (North, Metro Toronto and the remainder of the province). Fifteen cities and towns were then selected randomly within each region from lists provided by Statistics Canada. One was added to the last digit of telephone numbers selected

from the directories for the selected cities and towns. A quota system was used for the number of completed interviews in each of the regions, and an equal number of interviews with men and women was obtained.

While this is not a strict probability design, it was a reasonable approach. The use of pure random digit dialing (RDD) telephone numbers would have been a better strategy, but the cost of the survey would have increased. The selection of the cities and towns would have been better done using selection proportional to size, rather than the random selection of urban areas of different size within strata. However, post-stratification weighting can correct this problem to a considerable extent, and we believe such weighting was used. These problems of sampling, are therefore, relatively minor criticisms of the survey design.

More significant are problems affecting the degree to which the response rate biased the (already less than optimal) sample. Two or three callbacks were made to working household numbers, which is inadequate to provide a satisfactory response rate. Academic survey units tend to do seven to ten callbacks to gain adequate response rates but this also increases costs. I understand from a telephone contact with the survey house that the response rate for this survey was only 27%. Such a response rate cannot be considered acceptable if computed by a standard formulation such as dividing the number of completed instruments by the number of working household telephone numbers in the sample.

We have no firm documentation on the response rate, and a reported response rate as low as this might have been computed in some other fashion. A rate this low is, however, perfectly conceivable with the number of call backs indicated above. ISR estimates for response rates after two call backs would average just under 40%. If the report of 27% is correct, or even if the response rate was as high as we would estimate it after two call backs, the data resulting from this survey would be seriously suspect.

3024, not 4000, responses were obtained. At 27% this means 11,200 households were called. The callers got through to those who were at home. This would produce a bias leading to an underestimation of problems and of involvement with lawyers: single and divorced individuals, and higher income, more mobile respondents for example, are more likely to be contacted only after more extensive call backs.

An additional area of concern, relating to sample quality, is the respondent selection method used. The instructions to the interviewers were to select the male or female household head, or to treat a boarder or tenant as a head. This is, in effect, taking the information from anyone who answers. This is not a probability selection procedure. Furthermore, the survey asked if they (or anyone else in the household) experienced any one of a number of problems involving \$1,000 or more in damages, loss, injury, etc., at any time in the last three years. If the respondent, including a boarder or tenant, said yes,

very detailed questions about the problem(s) were then asked. Incident recall such as this can very often be unreliable, especially when the incident might not have involved the respondent at all and might be double hearsay. The results in fact confirm this. It may be that the many questions were too complex for the use of telephone interviews.

The results may nevertheless be reasonable in presenting a global picture of the utilization of legal services or access to the justice system, and of public opinion on selected attitudes towards the system. More refined information, as for example information dealing with the experience of individuals with members of the legal profession is much less likely to be reliable, because of the sample design problems discussed, and because of the very small numbers actually reporting involvement with lawyers over particular types of legal issue, or over any issue at all. Many questions of access to the justice system cannot, therefore, be reliably answered from this survey, and one would have had to pursue a stratified design, with screening for individuals actually involved with the legal system, in order to overcome these problems.

The clearest and most unequivocal responses are to be found in Table 46-1, which is blank.

Data

It is clearly not possible to evaluate the utility of the data without seeing the data analysis produced for or by the client. However, inspection of the tabular results suggests the following:

- 1) Overall public attitudes towards the legal system in Ontario are very favourable, despite the widespread expectation of delay and cost associated with legal proceedings: almost 2/3 had a high regard for the overall fairness of the legal system (Table 5-1) and over 85% believe Canada must maintain a good/fair system regardless of cost (Table 8-1). Of those whose problem was complete almost 1/2 got all they asked for and over half got all or most of it. (Table 165) Half got it right away. (Table 146)
- 2) Responses to question 17J suggest a very strong interest in mediation before starting court proceedings. (Table 9-2) This question is, however, loaded by the apparent assumption in the wording of the question that such mediation will produce settlements of disputes. In addition, no question of cost is raised with respect to such mediation and the suggestion is that it would be free. Worse, the question was asked of the entire sample of 3024 respondents, most of whom had not been involved in disputes.
- 3) The incidence of reported problems involving amounts of \$1,000.00 or more in the last three years (Table 1-1) sounds low to me, considering it includes not just car accidents but any problems with a car leading to a dispute and the incidence of family problems seems incredibly low - only 71 or 2%. As indicated above, those people were simply not reached.

- 4) The incidence of resort to legal counsel in response to such problems seems, in any event, very low: only one-quarter of those experiencing these problems report contacting a lawyer in order to seek compensation. (Table 147) Of 3024 interviews 1042 had problems, 933 sought compensation and 251 contacted a lawyer. Without a response rate closer to 65 or 70% rather than 27% I believe persons more likely to deal with lawyers were simply not reached.
- 5) Even if an accurate estimate of the utilization of legal services, the fact that less than 10% of the sample (251 out of 3024) have had any direct experience with the legal profession, means that conclusions from this survey regarding such experience must be treated with scepticism.
- 6) Only 1/4 of those who sought compensation found problems of delay and cost. (Table 171) Only 20% found their lawyers' fees too high. 4.4% found them too low (Table 156). Presumably, this translates into a degree of satisfaction, although the numbers are too small to check detailed tabulations showing the relative satisfaction of those who received satisfactory settlements or judgments vs. those who did not.
- 7) The problem is particularly severe because less than half of the respondents who used a lawyer (70/145) had any knowledge of the disposition of the case (whether it settled or went to trial) (Table 152). This reflects the problem of sampling and recall by respondents not actually involved in the issues that form the subject of the survey. I found it interesting that fully one-half of

the people who consulted a lawyer were not charged any fee (Table 153).

- 8) With only about 100 individuals reporting direct experience with proceeding with their problems through lawyers, and having information about that experience, this survey cannot be considered a reliable basis upon which to make conclusions about the Ontario public's reaction to dealings with the legal profession.

CONCLUSION

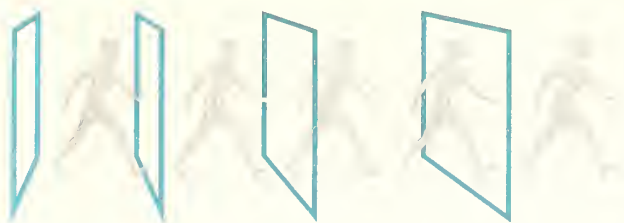
Anything can be improved, including the justice system. Most improvements cost money. Governments resisting a need for spending often say you don't solve a problem by throwing money at it. Wrong. That's exactly how you solve most problems. The reverse is true: you can destroy a system by withdrawing money from it.

It is not an excuse to say no funding will be provided until the system is made more efficient. That is to sacrifice justice on the altar of political expediency.

Of course some inefficiencies, some injustices, some attitudes can be corrected without spending. We must maximize the attainable within spending constraints.

We must also beware of radical measures and drastic remedies, promises of quick and magic solutions. The system is basically good and can be improved by working within the system. We must satisfy ourselves that a proposed alternative actually works and is an improvement.

And we can organize. We can examine the problems together. Starting today.



Conference
on Access to
Civil Justice

Congrès sur
l'accès à la
justice civile

ACCESS TO CIVIL JUSTICE: MAKING COMPARISONS

Conference on Access to Civil Justice

Inn on the Park, Toronto

June 20th-22nd, 1988

Iain Ramsay

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ACCESS TO CIVIL JUSTICE - MAKING COMPARISONS

In this paper, Iain Ramsay describes the different mechanisms used for handling consumer grievances and seeks to place them in a broader social and political context. He begins by outlining the limitations of using "dispute processing" as a conceptual framework for critical analysis: it tends to depoliticize disputes and hides its conservative bias toward "defusing conflict and desegregating group problems". Instead, he tries to think about recent developments in civil justice in terms of the contemporary agenda of political reform.

In describing the large growth in grievance handling agencies in the United Kingdom, he concentrates on the efficacy of the Insurance Ombudsman and Advertising Standards Association and explains how market pressures rather than legal norms are more relevant to their performance. He emphasizes why we should be slow to judge the "success" of such institutions without understanding the governmental and historical milieu in which they arose.

After showing what potent factor in dispute-resolution the changing role and interests of the legal profession and the increased involvement of government in framing legal services has been, he explains the workings of the Civil Justice Review and its tendency to evaluate performance in the technocratic terms of increased productivity, greater efficiency and 'systems management'. Lamenting the establishment's failure to assess the social functions of the courts, he explores the work of lower courts and the effect of costs rules on the substance and scope of litigation. Finally, he recommends the urgent need to instigate wide-ranging public debate, not dominated by so-called legal expertise, on the socially desirable level of litigation in society.

I want to tell two stories in this paper¹. The first describes mechanisms for handling citizens grievances related to private consumption in England. The second is about contemporary civil justice reform in England and is primarily a story of the reorganisation of professional roles², changing markets and the impact of budgetary constraints. In recounting these stories I wanted to find some common currency which might further understanding of the respective roles of the institutions investigated³. The recent development of dispute processing as

¹ In writing this paper I found the following extremely helpful; S. Silbey and A. Sarat, Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstitution of the Juridical Subject, Paper prepared for the Institute of Legal Studies, University of Wisconsin, School of Law, Workshop on Identifying and Measuring Quality in Dispute Resolution Processes and Outcomes, July 1987. This was particularly valuable for Part II. Cyril Glasser provided helpful information on current developments in England.

² Christine Harrington argues in Shadow Justice: The Ideology and Institutionalisation of Alternatives To Court (1985) that in the USA the movement towards informal alternatives has primarily been a story of changes in judicial management strategies and the legitimation of new judicial and professional roles.

³ Both might be related to the supposedly "worldwide" movement for access to justice. Access to Justice is a powerful political, legal and rhetorical symbol. See generally Sarat, 94 Harv. L. Rev. 1911 (1980-81). Writers have described the three waves of access to justice since the second world war as the provision of legal aid, representation of collective and diffuse interests and the development of informal dispute processing institutions. See M. Cappelletti and B. Garth, Access to Justice, A Worldwide Survey (1978). The last wave merges with the so called Alternative Dispute Resolution movement which has promised more "effective" and accessible dispute resolution, in addition to reducing costs and delays in the judicial system and providing greater community involvement in dispute processing. See Sander, (1985) University of Florida Law Review 00.

a discipline promised to provide a grid for this purpose. David Trubek, describing the work of the Wisconsin Civil Litigation project indicated that:

the dispute was conceived as the common denominator uniting events ...handled both by courts and by other forms of third party dispute processing mechanisms. If similar disputes could be identified in court and in other settings, and if the impact of different institutions on such disputes and disputants were measured, the dispute focus would answer the need of functional analysis and institutional comparison.⁴

Disputing would provide the conceptual link between law and society, allowing researchers to analyse such issues as the role of courts in society, the appropriate space for informal justice and the usefulness of lawyers in dispute processing. An influential wing of this perspective has provided the academic underpinning for the development of Alternative Dispute Resolution in the USA. Critics⁵ have however drawn attention to the limitations of dispute processing as a framework of inquiry. For example, it tends to obscure the political and social context of conflicts in society and the discontinuities between differing contexts; it supposedly provides a common grid for thinking about landlord/tenant disputes in inner cities, international commercial arbitration, consumer disputes and labour arbitration. It individualises problems which may take on

⁴ Trubek, (1980-81) 15 Law and Society Review 000.

⁵ See Silbey and Sarat supra at pp00-00. Merry provides a useful summary of criticisms in "Disputing Without Culture" (Review of Goldberg, Green and Sander, Dispute Resolution) 100 Harv. L. Rev., 2057. In setting out these criticisms I am obviously painting with a broad brush and summarising a variety of critiques.

a different hue when viewed aggregatively; problems of inequality of bargaining power are viewed as issues of maintaining a "balance" between individual parties rather than raising broader issues of redistribution and political power. Finally, it conceives of individual disputes as a problem --as something to be solved by the appropriate social mechanism. At bottom the critique is that disputing contains conservative political biases - towards defusing conflict and disaggregating group problems. Specifically it is argued that in the USA apparently neutral and technocratic studies of alternative dispute resolution have been harnessed to the political agenda of the elite judiciary and the self interest of legal and other professional groups. Thus it provides a convenient rhetoric for responding to the perceived "crisis of the courts", justifying the diversion of cases "inappropriate" for adjudication and reserving "the courts for those activities for which they are best suited"⁶.

But what are the activities for which courts and judges are best suited? This question raises the general normative theme of the social role of state courts in a society dominated by large private and public bureaucracies, what is in effect a corporate society.⁷ This theme is ultimately about the nature

⁶ Sander, quoted in Silbey and Sarat at 15

⁷ See further on modern society as a corporate society, Roberto Unger, Law in Modern Society (1976) at pp000-000.

and character of law in this society.⁸ Questions about courts are obviously political in a broad sense; who will have access to courts? why? Under what conditions should the state subsidise access to them? They are also in the more limited sense about the political power of professional interests and political battles over the distribution of professional tasks. For example, who will set the political agenda for judicial reorganisation and who will control the administration of the courts? Intellectuals and academics are also part of this political arena. They aid in setting agenda and legitimising changing judicial and professional roles. Intellectual and political agenda are often closely related⁹.

My themes are therefore those of how to think about courts and law in a corporate society and the political interest group pressures involved in reforms of civil justice. We are accustomed to view most policy making as the outcome of political interest group pressures and bargaining, where normative goals such as rights or efficiency often function as rhetorical tools for particular interests.¹⁰ We should not be surprised if this is

⁸ For a plea for the recognition of pluralism in modern society see H.W. Arthurs, Without the Law (1985).

⁹ See Glasbeek and Hasson "Some Reflections on Canadian Legal Education" (1987) 50 Modern Law Review 77.

¹⁰ See eg S. Scheingold, The Politics of Rights (1974); the public choice literature in economics, building on the interest group pluralism of political science has elaborated the configurations of the various political interest group games. A useful overview is provided in M. J. Trebilcock et al, The Choice of Governing

true of civil justice reform. Recognition of this fact suggests that if we find the outcomes of this process to be undesirable then attention must be focused on attempting to change the process of reform. These are of course large topics and I can do no more than raise some of the relevant issues in this paper.

I

Since the second World War there has been a large growth in grievance handling agencies in the UK.¹¹ Many of these related to problems of collective consumption in areas such as education, health and social welfare and housing. Examples include the Parliamentary Commissioner for Administration, Health Services Commissioners, Consumer Councils in Nationalised Industries, Citizens Advice Bureaux. The area of private consumption has also spawned many institutions including Consumer Advice Centres, Trade Association arbitrations, The Advertising Standards

Instrument (1982).

¹¹ The detailed story of their development may be found in Harlow and Rawlings, Law and Administration (1984) at p000, and see P. Birkinshaw, Grievances, Remedies and The State (1985).

Authorities and most recently the growth of Ombudsmen in the area of financial services. These were in addition to the system of tribunals and the various internal complaint handling procedures developed within public bureaucracies to handle complaints. Many of these agencies costs were borne on public funds and access was often free of all restrictions or subject to minimal ones. It is obviously dangerous to generalise about such an apparently diverse range of institutions but several points may be made. First, they appear to demonstrate the peripheral nature of lawyers and the courts to the everyday problems of collective consumption in the welfare state and in particular to the processing of individual disputes. Second, most of these institutions were concerned with individual grievances rather than general questions of policy making and had only a marginal impact on policy making or on the normative order.¹² Within these systems individuals were often complainants rather than rights bearers. Complaining probably provided an opportunity for an institution to explain its policy to an individual.¹³

The area of private consumption provides a useful context for investigating dispute processing and access to justice in contemporary society. The institutional and political context

¹² See Birkinshaw op cit at p000, McAuslan, "Administrative Law, Collective consumption and Judicial Policy", (1983) 46 Modern Law Review 1 and see Rawlings, Review , (1986) 49 Modern Law Review 00

¹³ For a helpful discussion of the differences between complaining and pursuing ones rights see Markovits, Pursuing One's Rights under Socialism 38 Stanford Law Review 689 (1985-86)

include an independent regulatory agency (The Office of Fair Trading)¹⁴ and a Department of State (The Department of Trade and Industry), a variety of new professionals (local authority trading standards officers and Citizens Advice Bureaux), a state financed consumer council (The National Consumer Council), a privately funded consumer pressure group (Consumers Association) and industry trade associations. Private industry groups play an important role in policy implementation and self regulation is often a preferred form of regulation. The development of consumer policy has been primarily through bargaining between interest groups and government players, resulting in legislation or codes of practice. Litigation has played a minor role in the development of public norms in relation to consumers.¹⁵

Negotiation between supplier and consumer remains the dominant method for processing perceived consumer grievances.¹⁶ Limited evidence suggests that market pressures rather than legal

¹⁴ The history and performance of this agency is discussed in Ramsay, Policing the Consumer Marketplace, in R. Baldwin and C. McCrudden (eds) Regulation and Public Law (1987).

¹⁵ This was the conclusion of Borrie in The Development of Consumer Law and Policy, Bold Spirits and Timorous Souls (1983). This may be partly explained by the existing English rules on costs, fees and financing of litigation and the difficulty of maintaining group litigation. These are discussed below at pp 27-29. However this explanation fails to account for the fact that in other areas of policy eg welfare benefits, pressure groups have used a test case strategy. See T. Prosser, Test Cases for the Poor

¹⁶ See generally, Office of Fair Trading, Consumer Dissatisfaction (1986); T. Ison, Credit Marketing and Consumer Protection (1979) Ch. 6.

norms are most relevant at this level. A small proportion (about 3%) reach Trading Standards Departments or Citizens Advice Bureaux. Lawyers play almost no role in mediating these consumer problems, with Citizens Advice Bureaux the dominant source of advice and mediation.

There are several industry complaint bodies.¹⁷ Two institutions are worth investigating here, The Advertising Standards Authority and the Ombudsmen in relation to financial services.

Ombudsmen have recently become a popular form of grievance mechanism in financial services markets.¹⁸ The rationale for the development of the Ombudsmen schemes was primarily that of enlightened industry self interest. In one case it was a means of raising the image of the industry and possibly forestalling

¹⁷ Among the best known are the conciliation and arbitration schemes operated under trade association codes of practice approved by The Office of Fair Trading. These now operate in over twenty industries although arbitration seems to be used by consumers only in the field of package holidays and automobiles. From 1983-86 there were 1764 holiday arbitrations compared with 3 in relation to furniture and none at all concerning photographic equipment, funerals, vehicle body repairs or motor cycles. See R. Thomas, Alternative Dispute Resolution: Consumer Disputes unpublished paper presented to Annual Conference, Society of Public Teachers of Law (1987) Appendix 2. For further discussion and references on codes of practice see Ramsay, supra footnote 14 at pp 190-192.

¹⁸ They have now been established in the insurance, banking and building society sectors. For background on these institutions see generally Morris, "The Banking Ombudsman" (1987) Journal of Business Law 131 and 199.

regulation at a time when it was subject to outside criticism¹⁹, in another a primary goal appears to have been the achievement of a competitive edge over other industries.²⁰

The Insurance Ombudsman is the longest established (1980) and provided the model for other industries. Its members now account for over 80% of the domestic insurance market. The objectives of this scheme are to provide a "grievance person" for complaints, disputes and claims made in connection with policies of assurance issued by members of the Bureau. Financed by the insurance industry the independence of the ombudsman is intended to be achieved by the interposition of a council composed of a majority of outsiders.²¹ His/her powers are to act as conciliator, adjudicator, or arbitrator with power to make awards up to 100,000. When making awards he/she may have regard to a wide variety of legal and non legal criteria.²²

¹⁹ This was the case of the insurance industry. The Office of Fair Trading had for several years attempted to persuade the industry to be more responsive to consumer concerns and in January 1980 the Law Commission had prepared a draft bill to reform insurance law. The National Consumer Council was pressing the industry to achieve reform and insurance companies were getting a bad press for their handling of complaints. There was also disquiet after industry lobbying had achieved exemption for it from the terms of The Unfair Contract Terms Act 1977. See "The Ombudsman; how industry made up its mind", Policyholder Insurance Journal, 3 April 1981, p11.

²⁰ This was one motive in the case of Banking services. See Morris supra and TSB Review, October- December 1985.

²¹ The councils have no power over the financing of the scheme.

²² S/he may "have regard to the terms of the contract, to act in conformity with any applicable rules of law or relevant judicial authority, general principles of good insurance practice, his Terms of Reference and the standards of insurance practice and

These terms of reference focus on dispute settlement rather than the regulatory role of identifying a pattern of grievances or making recommendations for changes in procedures, a task sometimes associated with ombudsmen²³. The Annual reports of the Ombudsman do however draw attention to general issues raised in complaints and have received press coverage. The impact on the procedures of the insurance industry has not been measured.

In 1986 the Insurance Ombudsman received over 10,000 telephone and written enquiries. Of those within the terms of reference many are passed on to the companies,²⁴ or conciliated or settled after investigation and few are arbitrated. The company decision is confirmed in four out of five cases.

How should we understand and evaluate the work of these ombudsmen? Do they make justice more accessible by reducing a consumer's costs (economic, technical and psychological) in complaining and achieving compliance with a successful award? Is it likely that the Ombudsmen will eventually become mechanisms of

codes of practice, but not to be bound by any previous decision made by him" (sic).

²³ For discussion of the potentially ambivalent role of ombudsmen as both grievance processor and regulator see Harlow, "Ombudsmen in search of a role", 41 Modern Law Review 446 (1978). The tension between these two roles is recognised in an article on the Banking Ombudsman, "Agony Aunt or investigative official- what will be the role of the new banking ombudsman?", TSB Review October - December 1985.

²⁴ The terms of reference require a consumer to have exhausted the internal procedures of the company before the ombudsman will intervene.

social control, "institutionalising and domesticating dissent"²⁵ concerning the market operations of the insurance industry? Reading the annual reports of the Insurance Ombudsman one obtains the impression that for the Ombudsman the basic problems are those of individual behaviour, of the occasional irresponsible insurance agent or of consumers who fail to take reasonable care of their property or labour under the "myth" that there is a right to obtain insurance. At the end of each report is advice on how each side (insurer or consumer) could behave more prudently in the future. His/her work might be interpreted as part of a learning process for consumer and insurer. But it is a relatively limited dialogue and the reports read more like instructions for future behaviour. The relevant norms are those of the rational consumer and a prudent insurer in a well functioning market. What is lacking is any sense of the distributional background to the problems or the potential power differential between the parties. The consumer is to be adjusted to the realities of the marketplace but there is no exploration of the nature of that marketplace.

The Advertising Standards Authority was established in the early 1960s to forestall the possible introduction of a Federal Trade Commission style agency in the UK and to raise the image of the trade. Financed by the advertising industry through a levy on advertising costs but with an independent board, composed of a

²⁵ See A. Hirschman, Exit, Voice and Loyalty (1971) at p 000.

majority of outsiders, it considers complaints and monitors advertisements in the press. In 1986 it received 7820 complaints. The ultimate sanction for breach of its advertising code is refusal of access to the print media but this is rarely used.

The ASA has from the outset developed in the shadow of potential legislative regulation. Its performance has been watched closely by outside groups throughout its existence and it has responded by continuing attempts to upgrade its effectiveness. It appears to have succeeded since there is a remarkable consensus among establishment consumer, industry and government representatives that the ASA system works well²⁶. Indeed the government, in negotiating the implementation of the EEC Directive on Misleading Advertising, ensured that a role in policing misleading advertisements be maintained for self regulatory organisations, thus ensuring the continuing role of the ASA.

Several reasons have been put forward for the apparent success of this body. First, the high visibility of advertising

²⁶ Sir Gordon Borrie, Director General of Fair Trading describes it as an "excellent system of self regulation" (Borrie, supra, footnote 15) : the Consumers Association, after noting that self regulatory codes are seldom effective commented that "the one obvious success has been the British Code of Advertising Practice". For a comparative appraisal see J. Boddewyn, "Advertising Self Regulation: organization structures in Belgium, Canada, France and the United Kingdom", in Streek and Schmitter (ed.), Private Interest Government (1985). The Labour Party would however prefer to substitute regulation for the present system. See Consumer Charter, (1986). Cranston is more sceptical of its success, R. Cranston, Consumers and the Law (2d ed, 1984) Chapter 2.

and the continuing controversy over its power to shape social goals make it a continuing topic on the public agenda. Second, the continuing threat of legislative regulation has provided a strong incentive for improving the system of self regulation. Third, the independent nature of the ASA council provides some degree of objectivity in code development and representation by the main consumer pressure groups permits them to influence the development of the code. It must also be noted that the advertising industry has considerable economic and political weight and is able to mobilise support in the media and through the over 80 MPs who have advertising interests of one kind or another²⁷.

The ASA fits neatly within Streek and Schmitters conception of private interest government where an attempt is made to "make asociative,, self interested collective action contribute to the achievement of public policy objectives"¹⁷. Government encourages a private body to carry out a public function. Lawyers bred on Dicey may see in this an illegitimate use of power whereas economists may view it as reducing the costs of policy implementation. It makes obvious what has perhaps always been true in English policy making, the lack of a clear distinction between the private and public realms. The current Director of the ASA believes that it is "enlarging the content of democratic citizenship" and it is worth quoting his remarks in the context

²⁷ See further Baggott and Harrisson (1986) Policy and Politics 143.

of this paper.

I see it also as promoting the administration of justice...The ASA is part of (a) spectrum of quasi judicial institutions which I regard in practice as being of much greater and growing significance to the daily life of the general public than are the civil courts...I am anxious to stress how its procedures are enlarging the content of democratic citizenship by conferring new rights and remedies for complaints which cannot easily or cheaply be pursued through the courts, and access to the facilities is free. In the course of enforcing rules and standards of conduct self-helpfully framed and imposed upon itself by the advertising industry, I believe that ...it is helping to demonstrate that the rule of law is not exclusively, or necessarily importantly, a matter for legislation or for lawyers or for courts and tribunals or for legal sanctions. In this way law becomes part of ordinary life and an instrument for betterment, not a negative means of regulating pathological or marginal situations²⁸

The argument that it is playing a governmental role is underlined by an examination of the many complaints received by the ASA. Consumers receive no tangible redress for a successful complaint and, applying the idea of rational self interested behaviour, one wonders why individuals complain to this body. One explanation is that they wish advertisers to respect public standards and values: complaining to the ASA is therefore behaviour akin to complaining to a local Member of Parliament. To see oneself as a complainant is however quite different from conceiving oneself as a bearer of rights. Complaining resembles an appeal for help by someone who realizes that the solution to their problems does not lie in their own hands.²⁹

²⁸ O.R. MacGregor, Social History and Law Reform (1982) at p00.

²⁹ See Markovits, supra footnote 12 at p00.

The ASA has been criticised for its handling of issues on which there may be significant value conflicts in society, for example taste, decency, sex stereotyping and the representation of minorities. It has according to Boddewyn "reacted grudgingly and slowly to these emerging or growing concerns". Certainly the ASA has made some ill conceived responses to feminist concerns and it is only through continued and sometimes coordinated external pressures that it has made any significant response to gender issues in advertising. Its reports on these issues have however provided a focus for public dialogue and debate in the media and other parts of the political arena.

At this point it might be thought valuable to briefly assess these institutions. But what criteria should we use? Perhaps we could refer to the values which one US scholar has associated with access to courts to enforce one's rights:

dignity, reflecting a concern for the loss of self respect which a person might suffer if denied the opportunity to litigate; participation, reflecting the value of litigation as one way in which persons exercise influence in societal decisions which they care about; deterrence, recognising litigation as a mechanism for influencing or constraining behavior thought socially desirable; and effectuation values which see litigation "as an important means through which persons are enabled to get, or are given assurance of having, whatever we are pleased to regard as rightfully theirs"³⁰.

My description indicates that the institutions described above aspire to some of these goals. This suggests that courts and rights are not the only vehicle for obtaining these social

³⁰ F. Michelman, "The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights" (1973) Duke Law Journal 1153 at 1172.

objectives. A subsequent question might be therefore whether consumer claims should be channelled into the courts, through increased access to litigation, for example, through class actions or subsidies to other forms of public interest litigation.³¹ How should we attempt to answer that question? The answer not only requires some thought about the appropriate social level of litigation and the relative role of rights but also depends on ideological perspectives on consumer claims.³² For example, consumer problems might be viewed as primarily individual, perhaps idiosyncratic problems with no broad policy significance or relation to widespread social injustices. Problems are random and inevitable consequences of living in a complex society where interactions are between individuals and bureaucracies. Based on this perspective a response would be to achieve fast, cheap dispute processing. The dominant rhetoric might be that of achieving communication between the parties, adjusting interests and reestablishing an equilibrium. The conflicts are perceived as conflicts of interest rather than value conflicts. On this view ombudsmen and other informal institutions can play an important role in processing consumer complaints.

A second perspective views small claims as symptoms of

³¹ See further the general discussion of public interest actions below at pp33-34.

³² The following description draws heavily on E. Steele, "Small Claims: Competing Perspectives" (1981) American Bar Foundation Journal 00.

broader social injustices³³, as microcosms of important value conflicts in society and underlying social problems. The rhetoric of redistribution and rights is likely to dominate this perspective and to demand public aggregate responses, for example through class actions or regulatory agencies. Arguments are about the legitimacy of existing distributions of power, whereas the first perspective tends to see informal mechanisms as further legitimating the existing distribution.

These ideological perspectives may themselves be a consequence of existing institutional structures. This causes significant problems for any policy premised on giving consumers "what they want" in relation to redress mechanisms. What one wants is a consequence of what one has at present, what one thinks possible and so on, expectations which are partly dependent on existing institutional arrangements. A dispute processing perspective courts the danger of conceiving the central issue as one of providing consumers with the appropriate mix of institutions in response to existing consumer demand, which is measured partly by discrete empirical studies of consumer satisfaction with various institutions³⁴.

My conclusion at this point is that it is extremely difficult to measure the "success" of consumer redress mechanisms

³³ This seems to be the conclusion of Laura Nader in her work on consumer complaint handling in the USA; L. Nader, No Access to Law (1980).

³⁴ My comments here raise a number of difficult methodological issues.

in isolation. Political, social and institutional background are central. In addition, it would be misleading to conceive of Ombudsmen or the ASA as simply concerned with processing grievances. An understanding and evaluation of their role ought, for example, to take into account the historical and institutional patterns of industry-government relations from which they arose. Nor is it possible to avoid controversial normative issues in assessing these institutions. For example, I raised but did not answer the question of the social role of rights and courts in relation to consumer claims. I now turn to explore this question more generally in the context of current reforms of civil justice in England .

II

Reforms of civil justice in England are intimately connected to changes in the market for legal services, the material interests of the legal profession and the key role of the government in financing legal services through legal aid.

Abel argues that the traditional ideal of disinterested professionalism is in decline in England: the legal professions have lost control over both the supply and demand side of their markets³⁵. In retrospect, The Royal Commission on Legal Services

³⁵ See R. Abel, "The Decline of Professionalism", (1986) Modern Law Review 1: The Legal Profession in England and Wales (1988)

in 1979 appears as the last gasp of the old professionalism³⁶. Since that report the conveyancing monopoly has ended³⁷, solicitors have relative freedom to advertise and the Law Society have even floated the idea of multi partnerships. The solicitors profession is no longer a homogenous group. There has developed the mega firm , primarily in the City of London, serving the needs of large national and international capital units. These firms have become large bureaucratic organizations taking advantage of economies of scale and specialization.³⁸ Smaller units of production may be divided between those serving regional capital and the significant number of firms who still rely on conveyancing and legal aid for a sizeable slice of their

³⁶ Report of Royal Commission on Legal Services (2Vols.) (1979). See for example their definition of professionalism in Volume 1 at para 3.25. The Commission had recommended the maintenance of the conveyancing monopoly.

³⁷ It is not clear yet what will be impact of this development. There is certainly not a free market in conveyancing services since individuals who wish to provide conveyancing services must be licensed. The impact on fees is likely to come from the loosening of restrictions on marketing methods. In 1983-84 conveyancing accounted for 30 per cent of gross fee income. Sole practitioners and small firms derived significantly larger percentages than large firms. Abel (1988) at pp 219 -220.

³⁸ Abel indicates that the larger solicitors' firms "have more than 500 principals and employees and numerous branch offices, both domestic and international. Here bureaucratization is symbolized by the emergence of the unadmitted chief administrator, which effectively severs management from control in the professional firm..." Abel op cit at p 301. Glasser indicates that in 1984-85, firms with 15 partners or more, many of which did little or no legal aid work, provided 23% of the income of the profession. C. Glasser, "Financing Legal Services", (1988) Law Society Gazette, 20 April, 1988 at 11.

income.³⁹

The loss of the conveyancing monopoly has stimulated attempts at the creation of market demand. This includes providing leaflets for accident victims about the possibility of claiming compensation⁴⁰, the establishment of an unsuccessful family legal expenses insurance policy⁴¹, marketing the need for their services to small businesses⁴² and even the introduction of contingency fees has been mooted⁴³. The Law Society has also attempted to upgrade its image to consumers and its ability to act as an effective self regulatory body.⁴⁴ The ideology is now that of consumer service and efficiency. Lawyers are hoping to

³⁹ Glasser indicates, perhaps surprisingly, that in 1986, 84% of all practices had five partners or less and he argues that "it is this group which provides legal services for the community at large and still relies on domestic conveyancing and sums from public funds as major determinants of income". id. at 13.

⁴⁰ This is based on a pilot scheme which had been introduced in Manchester in 1978. See H. Genn, Meeting Legal Needs (1980), which describes its operation. The Law Society have also introduced a scheme for a free interview with a solicitor in accident cases and have recommended the extension of legal aid for representation before tribunals. This was one of the recommendations of the Royal Commission on Legal services.

⁴¹ Abel at 225-226.

⁴² See Financial Times, Monday April 18 1988, indicating that the Law Society is setting up a nationwide advice scheme to help small businesses. This followed a survey by the small business research trust which showed that only 14 per cent of small businesses made regular use of a solicitor.

⁴³ See Law Society, Improving Access to Civil Justice, (1987). They were rejected however on "ethical" and "consumer protection" grounds.

⁴⁴ It recently introduced a Solicitors Complaint Bureau which can arbitrate on malpractice claims.

persuade consumers (such as small business and individuals) that they need their services. They have also become the staunchest defenders of the legal aid system.

The Barristers wing of the profession is also likely to change significantly. Half the income of the bar derives from public funds which fuelled its expansion during the 60s and 70s. This period is now at an end. The most powerful consumer of legal services, the state, is motivated by a desire for trimming public expenditures. It has been accused of attempting to terminate in the current Legal Aid Bill the demand led approach to legal aid⁴⁵ and, in accordance with its ideology of competition, promises to attack existing restrictive practices⁴⁶. The expected loss of exclusive audience privileges in the lower criminal courts will have a significant impact on the bar.⁴⁷ The general common law bar will contract leaving an elite group of specialists.⁴⁸

Both sides of the profession are therefore going through a period of significant change as they attempt to establish new

⁴⁵ In 1975-76 the bill for legal aid when the matter involved court procedures was £49million. In 1985-86 it was £257 million.

⁴⁶ See Review of Restrictive Trade Practices Policy: A Consultative Document (London, HMSO, 1988) (Cmnd 331)

⁴⁷ The Lord Chancellor's Department Efficiency Scrutiny team indicated that the requirement of briefing a barrister for making simple pleas in the Crown court was an unnecessary call on the legal aid fund.

⁴⁸ The Bar Council, which is now dominated by younger practitioners, many of whom are dependent on legal aid is fighting a rearguard action against these developments.

markets, consolidate existing positions and change their public image. The conveyancing monopoly and restrictions on marketing their services had protected solicitors for 100 years against competition from other professionals. Increasingly lawyers face competition from new professionals, for example in the area of family law matters, requiring both new styles of legal practice and a new rhetoric to justify these changes.⁴⁹

Changes in access to legal professionals will be therefore primarily the outcome of professional search for new markets rather than any disinterested search to meet a perceived unmet legal need.⁵⁰ I am not suggesting that any innovations in legal services are simply an exercise in demand creation. Rather lawyers are like other sellers of products, attempting to convince consumers that their product is superior to other alternatives.

But there still remains the difficult issue of determining when individuals are entitled to legal services irrespective of their ability to pay the market rate. Legal services policy in England has tended to emphasise the importance of formal equality

⁴⁹ The development of conciliation and mediation in divorce has become an arena for interprofessional rivalry. See eg "The Divorce Solicitors Who Don't Take Sides, Law Magazine, (1987) at 00. The General Council of the Bar in their submission to the Civil Justice Review noted that "Alternative dispute resolution should be encouraged and developed. In particular the initiatives of the Bar in supporting the development of Court annexed arbitration and in setting up the London Bar and Family Law Bar Arbitration Schemes should be encouraged".

⁵⁰ The debate on unmet legal need is discussed in "Evolution of Legal Services: Practice without Theory", A. Paterson and D. Nelken (1984) Civil Justice Quarterly 229.

for individuals as a goal rather than the role of legal services in serving a broad redistributive role for groups. The Royal Commission on Legal Services recommended a broad extension of the availability of legal aid for individual advice and claims. Operating both on a rather narrow conception of lawyering and the distinction between legal and political action it did however give little encouragement to actions on behalf of groups or communities. There has been a general hostility to innovative forms of delivery represented for example by Law Centres which attempted to develop group and community based initiatives. Law Centres have attracted continuing distrust from the profession, notwithstanding their support from community organisations, and they continue to experience major funding difficulties. Citizens Advice Bureaux remain the prime source of advice on problems of collective consumption for the lower middle and working class groups. These institutions probably have greater knowledge of the social security system, how to deal with debt summonses and consumer issues than most individual solicitors. The general lack of acquaintance among most solicitors of the rules and regulations of the welfare state raises questions concerning the selection of judges in the lower civil courts, whose business is concerned with these issues, and which are currently staffed exclusively by members of the legal profession.

The Civil Justice Review was established in 1985 to "improve the machinery of Civil justice in England and Wales by

means of reforms in jurisdiction, procedure and court administration, and in particular to reduce delay, cost and complexity."³¹ The focus was on the five main classes of civil business: personal injuries, small claims, debt, housing and commercial cases.³²

The Civil Justice Review, in those reports published to date, and particularly in its General Issues paper, has hitched its star to increased productivity, greater efficiency and

³¹ Civil Justice Review, General Issues, Consultation Paper No 6 p.1. The background to the Review is described in (1985) Civil Justice Quarterly 193. The Review was originally intended to be an internal review by the Lord Chancellors Department as a response to criticism in the Benson Commission (The Royal Commission on Legal Services) of the costs and duration of litigation. The Department thought that the review should be carried out by a small internal group aided by management consultants. When these proposals were unanimously rejected at an elite seminar, the Civil Justice Review, with an independent steering committee was established. A number of factual studies were commissioned by management consultants, several consultation papers were published and a Green Paper will be published in June 1988.

The Zuber Commission in Ontario also identified costs, delay and complexity as the basic problems of the court system and indicated that "many of the conclusions that we had reached were similar to those contained in the Civil Justice Review". Report of The Ontario Courts Inquiry, The Honourable Mr Justice Zuber (1987).

All inquiries into the procedure of the English civil courts during the twentieth century have identified costs and delay as the main problems. However no review (including the Civil Justice Review) has thought deeply about the fundamental social function of the courts and civil procedure. The last review to undertake this task were the Reports which culminated in the major reorganisation of the courts in the late nineteenth century.

³² It thus ignored the important role of tribunals, such as industrial tribunals, which decide many more disputes than the courts and often are more legalistic than courts.

"system management". The approach is avowedly technocratic.⁵³ The primary problems identified are those of costs and delay⁵⁴ and the dominant goals throughout the report are those of efficiency and effectiveness although at no point is efficiency clearly defined or applied with any rigour.⁵⁵ One senses that this is equated with cost cutting under pressure from the Treasury. The Review proposes increased management of court business with improved judicial monitoring of case progress⁵⁶ and greater use of performance indicators. Civil procedure is to be simplified with greater pre trial disclosure, pre trial

⁵³ Computers seem a central mechanism for ushering in the brave new world of efficient justice. Resnik (see infra footnote 56) is sceptical of the impact of these various schemes of systems management on costs and delays in the courts.

⁵⁴ It is never made clear what constitutes an unacceptable delay. See further Posner (1972).

⁵⁵ See Para 56.

⁵⁶ Paras 170-172. In 1982, Resnik described the growth in the USA of the phenomenon of "managerial judging". Judges, in response to increasing case loads, were increasingly becoming involved in the pre trial management of litigation and were drawing on systems management techniques to solve their problems. Resnik argues that although these techniques have provided more information on the courts and led to greater lawyer accountability, there is no clear evidence that this managerial style has decreased delay, led to more dispositions or reduced costs. She also argues that the side effects of managerial judging include substantially increased judicial power to decide what is the best and least expensive form of pre trial procedure. Moreover judges, because their performance is quantified, become oriented towards quantitative results and have a personal stake in being efficient.

The Civil Justice Review proposals are a small step towards managerial judging. However the extremely small number of judiciary in England would make it difficult for judges to develop this role without a large increase in the judiciary. See Resnik, Managerial Judging, (1982) Harvard Law Review 000.

preparation for complex cases, more active judicial involvement in this process. The proposed integration of the County Court and High Court would mean that most cases will start in the County Court⁵⁷. Court annexed arbitration and paper adjudication are recommended as methods of reducing costs and delay.⁵⁸ The emphasis on orality is to be reduced and indeed a goal seems to be a reduction in the number of trials. In a short section on Access to Justice they suggest a more interventionist role for registrars in small claims arbitration where one party is unrepresented and greater cooperation between courts and advice agencies such as CABx. The approach seems designed to achieve faster processing of "small claims" by low levels of the judiciary. Thus most cases would commence in the lower County Court " with a limited range of cases, for example commercial cases"⁵⁹ continuing to start in the High Court. The High Court would therefore remain as the seat of elite justice. Reform will permit the "dumping" of uninteresting cases allowing the small numbers of higher level judiciary to maintain control of their power to declare the law.

The Review is perhaps most interesting for the questions it did not ask. At no point is there any extended discussion of the

⁵⁷ This proposal has been vehemently opposed by the Bar Council and does not appear to have support in the higher levels of the judiciary (based on responses to consultation paper). This is hardly surprising since it would lower the prestige and elite nature of High Court justice.

⁵⁸ See paras 217 and 218

⁵⁹ Civil Justice Review, Consultation Paper No 6 at p108.

social function of courts or the socially desirable level of litigation. The existing jurisdictions are taken for granted with the consequence that alternatives such as no fault compensation schemes in tort or imaginative alternatives in the area of debt enforcement were not considered. There is no discussion of the relationship of the courts to the extensive system of tribunals which are often of far greater significance to the average person⁶⁰. The impression is that the Review views litigation as a private process where a central goal is settlement. Apart from the emphasis on settlement there is little thought given to whether the structure of civil justice should continue to reflect this model which crystallised in the reforms of the late nineteenth century. This view of litigation as a private process has received powerful backing from elite members of the judiciary⁶¹. This focus for adjudication is further underlined by the general enthusiasm for arbitration from both judiciary and bar.⁶²

⁶⁰ There is also the curious spectacle of the rhetoric of access to justice being used to justify the special needs of the Commercial Court, whose caseload comprises primarily international shipping litigation.

⁶¹ See for example Lord McLuskey's Reith Lectures (1986), Lord Donaldson, Master of the Rolls, in The Guardian October 19 1984 where he recommended among other things that courts have powers to require parties to settle.

⁶² The Bar, in its submission to the Civil Justice Review argued that "Alternative dispute resolution should be encouraged and developed. In particular the initiatives of the Bar in supporting the development of Court-annexed arbitration and in setting up the London Bar and Family Law Bar Arbitration Schemes should be encouraged". See also Arbitration (1987) at 00.

I wish to raise some questions about the social function of adjudication and this English conception of adjudication⁶³ by addressing two issues: the business in fact of the lower courts and the structure of costs, fees and financing of litigation.

The research conducted by the review and other studies indicate that lower court judges and registrars in the county court rarely settle disputes if that is interpreted to mean adjudicate on rights⁶⁴. They establish repayment orders for the repayment of debts or housing arrears and are often part of a larger process of debt collection. Most cases only have one party (the organisational plaintiff) and any individual defendants before them are generally unrepresented and unable to develop any legal defences. Interviews with registrars indicated a lack of unanimity as to their role in relation to debt collection and housing arrears cases. Some saw it as a "chore", diverting them from what they perceived to be their main role of adjudicating disputes;⁶⁵ others saw themselves as playing a social welfare role and referred individuals to welfare agencies. The Civil

⁶³ This is not of course a view limited to English judges. See L. Fuller, "The Forms and Limits of Adjudication", (1979) 92 Harvard Law Review at 353.

⁶⁴ See Civil Justice Review, Enforcement of Debts and studies cited in Ramsay (ed) infra at footnote 65.

⁶⁵ "So there you had a trial!" said the registrar after one highly acrimonious arbitration hearing. He was pleased that I had seen some "real court work". Settling disputes for the lawyers is like making arrests for the police: it is, as they see it, what they are for." M. Cain, "Who loses out on Paradise Island? The Case of Defendant Debtors in County Court", in Ramsay (ed) Debtors and Creditors (1986) at 106.

Justice Review suggests a more interventionist role and the development of links to welfare agencies.

But a fundamental question must be the authority and competence of these amateur judges (in the sense that their only training has been their experience in legal practice) to intervene in the complex legal and social issues raised by individual problems in the welfare state. This is underlined in a strongly worded submission by the National Association of Citizens Advice Bureaux to the Civil Justice Review:

The growth in the body and complexity of law touching on the everyday lives of individuals, for example, in the areas of consumer and housing, necessitates that County Court Judges and Registrars possess a fairly high degree of specialist knowledge. Bureau experience suggests that this is not always to be found at present. (After referring to the various areas of relevant statutory law) ... Judges should also ... have a good working knowledge of the social security system, of local authority housing allocation procedures and duties towards the homeless, and of the range of services provided by statutory and voluntary organisations. More generally, there should be training to develop a better understanding of the realities of poverty, debt, unemployment, racism and other forms of disadvantage. This is not simply a plea for a more socially aware judiciary; training in these areas should assist in the making of informed and just decisions, notably in respect of repayment orders in debt and arrears cases.⁶⁶

These comments raise some fundamental questions about the role of the lower judiciary. For example should the amateur model of the English judiciary move towards a more specialist

⁶⁶ The Future of Civil Justice, NACAB Response to the Civil Justice Review, General Issues Consultation Paper at p43. They also indicate that the "judiciary need to develop specific expertise in the conduct of cases along interventionist lines" and should "receive training in interviewing, communication and inter personal skills". id at 44.

bureaucratic model similar to other European countries?⁶⁷ If so, should the judges be drawn from a wider background than the legal profession? Should problems of debt be dealt with by courts⁶⁸? Are the lower courts to become a focus for problem solving rather than rights adjudication? At present neither the objectives of rights protection nor social welfare are well served.⁶⁹

The existing structure of costs, fees and financing of litigation in England probably induce settlement for the vast majority of personal injury claims⁷⁰ and discourage the initiation of low probability and novel claims. The combination of the payment into court procedure and the indemnity rule in relation to costs is likely to stimulate settlements where plaintiffs are risk averse one shotters and defendants are repeat players⁷¹ --the typical configuration in personal injury

⁶⁷ The contrast between these two models is discussed in M. Damaska, Structures of Authority (1986).

⁶⁸ Some of the options are canvassed in Ramsay (ed) Debtors and Creditors (1986).

⁶⁹ Studies indicate that significant percentages of debtors may have defences to claims which they are unable to assert effectively in court.

⁷⁰ Although there are great difficulties in comparing data, the impression is that a greater percentage of cases are settled under English procedure compared to the US. Ross in Settled Out of Court indicated that 4.2 per cent of personal injury cases reached trial whereas in England less than 1% reach this stage.

⁷¹ My conclusion is based on Shavell's hypotheses in "Suit and Settlement" (1982) Journal of Legal Studies at 68-69. The impact of a number of factors on settlement is discussed in D. Harris et al Compensation for Accidents and Injuries (1982) and the process of settlement bargaining is outlined in H. Genn, Hard Bargaining (1987).

litigation. The combination of the indemnity rule, the absence of contingency fees, the availability of legal aid only for relatively strong cases, and the limitations on group actions and public interest law firms make novel and precedent challenging cases difficult to sustain⁷².

These procedural rules will have an impact on the development of substantive law. For example, the law on consumer protection and products liability in England would probably be richer if these costs, fees and financing rules were altered to provide greater incentives for litigation. Some confirmation of this hypothesis is provided by the recent significant developments in substantive principles of judicial review which may be partly attributable to the simplification of procedural barriers to the initiation of judicial review. The large number of relatively controversial cases which have been brought under this procedure seems to be changing the perception of judicial

⁷² Many of the ideas in this part are developed from a valuable paper by J.R.S. Prichard. He suggests that five consequences may flow from these English rules. First, in England, relative to the United States, plaintiffs are encouraged to litigate relatively strong or safe cases. Second, plaintiffs are discouraged in England from initiating relatively novel or risky cases ie., those with a relatively low probability of success. Third, the relative support for novel cases in the US is increased by contingent fee arrangements since they allow the risk of litigation to be shifted from the client to the lawyer in circumstances where the lawyer is best placed to evaluate the value of the action. Fourth, group litigation is virtually prohibited in England. Fifth, the second, third and fourth effects are all amplified by the increasing frequency of pro plaintiff fee awards under various US federal and state statutes. See Prichard, A Systematic Approach to Comparative Law ; The Effect of Cost, Fee and Financing Rules on the Development of the Substantive Law.

role. As the law becomes looser the judge sees herself more as dealing with issues of public policy rather than adjudicating on private rights⁷³. We might also partly explain the traditional preference for lobbying over litigation in the consumer area as reflecting a "substitution effect" of the limitations of group and public interest litigation.

These points underline the fact that changes in procedure and the financing of litigation will not only have an impact on substantive law but may force us to rethink the role of courts in society. Certainly this was a consequence in the USA following the changing structure of litigation in the 60s and 70s.⁷⁴ In England the dominant ideology remains of a system of private ordering with settlement as a central goal. Civil justice might on this view provide its consumers with a variety of methods for dispute settlement - adjudication, mediation and arbitration. This dovetails neatly with the contemporary ideology of consumerism⁷⁵ -and freedom of choice.

⁷³ This is the view of a well known judge involved in judicial review. See Woolf J. "Civil Procedure Reform" (1986) The Law Teacher 000.

⁷⁴ The two central articles are A.Chayes, "The Role of the Judge in Public Law Adjudication (1976) 89 Harv. L.Rev. 1281 and O. Fiss "The Supreme Court 1978 Term. Forward: The Forms of Justice," 93 Harv. L. Rev. 1.

⁷⁵ This is also apparent in the report of the Zuber Commission . They argue that ADR should be "regarded only as a part of the total package of services offered by the Justice system...steps should be taken to emphasize the concept that, at least in civil cases, resolving issues in the courtroom is the process of last resort and should only be invoked when other methods have been tried and failed...Civil cases ordinarily concern only the parties and if they can resolve their disputes privately, no

These views should be placed alongside the current US debates on the role of the courts and the development of Alternative Dispute Resolution (ADR). As I read this debate, elite members of the bar, judiciary and the academy have championed alternative dispute resolution as a method of diverting issues away from the courts. The use of ADR is a response to the perceived costs and delays in the court system and the so called "litigation explosion".⁷⁶ The ultimate goal would be to ensure that adjudication was reserved only for "important" matters.⁷⁷ This would move US justice closer to the English elite model of adjudication with greater incentives for settlement and would represent potentially a move away from the ideology if not the reality of the constitutional right to one's day in court. These practical developments draw on an academic discipline of "dispute processing" which seems to conceive of courts as part of a continuum of dispute mechanisms which should be matched to differing types of dispute.

problem arises." Zuber Commission at 201-202.

⁷⁶ See J. Barton, "Behind the Litigation Explosion", 27 Stanford Law Review 567 (1975). The litigation explosion thesis is attacked in Galanter, "Reading the Landscape of Disputes: What we know and don't know about our allegedly contentious and litigious society", (1983) 31 UCLA L. Rev. 4.

⁷⁷ These developments seem to have obtained momentum from the Pound Conference in 1977, a series of speeches by Chief Justice Burger and President Derek Bok of Harvard University. The chief academic proselytiser of ADR is Frank Sander of Harvard University. See Goldberg, Green and Sander, Dispute Resolution (1985). This rhetoric has slipped into Canada. See A. Linden, "In Praise of Settlement: Towards Cooperation, Away from Confrontation" (1984) 7 Canadian Community Law Journal 4.

This movement has been critiqued by both the left and the centre as being merely a cloak for professional self interest, as representing a retrenchment for those groups who had fought for access to the courts in the 60s and 70s and as a fundamental misreading of the nature of adjudication in contemporary US society⁷⁸. The strongest critique of the private dispute settlement model is put forward by Owen Fiss whose position highlights the contrast between English and US visions of courts in society:

I doubt whether dispute resolution is an adequate description of the social function of courts. To my mind courts exist to give meaning to our public values, not to resolve disputes. Constitutional adjudication is the most vivid manifestation of this function, but it also seems true of most civil and criminal cases, certainly now and perhaps for most of our history as well'

Courts in his view are not simply another form of dispute resolution, to be subsumed within the adjudication, arbitration, mediation continuum. This trivializes the role of courts and the role of law. Law is essentially concerned with the explication and identification of values--essentially a public and political process. Thus Fiss contrasts the public role of the judge with that of the private arbitrator:

The function of the arbitrator is to resolve a dispute. The function of the judge, on the other hand, must be understood in wholly different terms: he is a public officer; paid for by public funds; chosen not by the parties but by the public or its representatives; and empowered by the political

⁷⁸ The various critiques are outlined by Silbey and Sarat supra footnote 1.

agencies to enforce and create society wide norms

Fiss' critique is that a dispute processing focus leads to conceiving of litigation as an annoyance to be diverted or settled rather than an opportunity to challenge injustice. Politically he believes it leads to an acceptance of the status quo and sees the dominance of settlement as a "capitulation to the conditions of mass society"⁷⁹.

Fiss provokes us to see the political nature of courts and law. His vision is that of a liberal American, hitched to the star of judicial exploration of the fundamental values of society. Yet we need not share his liberalism to be attracted to the idea that courts play an important political and ideological role⁸⁰ which may be overlooked in a dispute settlement perspective. Fiss also demonstrates that the debate about the role of courts is ultimately about the nature of law. On his view law is about the establishment of rights, which squarely places law in the field of moral philosophy. Social scientists and the technocratic disciplines associated with dispute processing have no particular competence on these questions of right.

But his vision of law and courts seems particularly

⁷⁹ Fiss, "Against Settlement", (1984) Yale Law Journal 1075.

⁸⁰ An example is perhaps the processing of debt cases. It is clear that courts do not settle disputes here but may play a significant symbolic role in reinforcing norms of repayment. Important parts of the history of common law adjudication could quite profitably be viewed as concerned with the creation of public norms. See eg P. Atiyah, The Rise and Fall of Freedom of Contract; M. Horwitz, The Transformation of American Law.

ethnocentric⁸¹. It is also anti pluralistic and views the courts as the central institution for the control of the large private and public bureaucracies in modern society. What is needed in his view,

"to protect the individual is the establishment of power centres equal in strength and equal in resources to the dominant social actors...(adjudication is) the one social process that has emerged with promise for preserving our constitutional values and the ideal of individualism in the face of the modern bureaucratic state"⁸²

To anyone who is not a particular type of North American liberal this is a highly contestable conception of the role of courts in society. I have already argued that Michelman's values associated with litigation might be achieved by other political institutions. An obvious example is regulation through the administrative process which may provide a more desirable forum for interest group politics. The "civil procedure" of interest group participation and the financing of public interest

⁸¹ See the interesting discussion of the impact of ethnocentricity on legal theorising in P. Atiyah and R. Summers, Form and Substance in English and American Law (1987). Fiss work may also have a legitimating function. It defends the hegemony of lawyers and law professors. Legal education can continue in "the grand style" of the Ivy League, teaching appellate cases and reflecting on fundamental moral issues. There is no need to study negotiation techniques or other practical and mundane issues. One is reminded of the response of the young lawyer in the Bronx in Bonfire of the Vanities recalling his experience of his Law school years at Yale: "It's a nice place. It's easy as law schools go. They don't try to bury you in details. They give you the grand design. They're very good at giving you that. Yale is terrific for anything you want to do so long as it don't involve people with sneakers, guns, dope, lust, or sloth." Tom Wolfe, Bonfire of the Vanities (1987) at 373.

⁸² Fiss, "The Forms of Justice" (1979) 93 Harvard Law Review 1 at 44.

interventions are themselves important objects of study.

An increase in the ability of courts to "declare public values" will have important substitution effects. It will reduce other perhaps more desirable forms of political action. This is clearly a complex political issue but the introduction of The Charter of Rights in Canada has made it of immediate practical importance.

The issues are well illustrated by the phenomenon of the "public interest law" movement of the 60s and 70s which, working within the pluralist tradition of US politics, used litigation as a vehicle for representing the underrepresented.⁸³ Public interest litigation has not however flourished in the UK. The courts, although increasingly politicised, have not generally provided a platform for the underrepresented and any victories against the state in court may immediately be reversed in a Parliament dominated by the executive.⁸⁴ Harlow argues that it has been political action outside the courts which has challenged bureaucratic power and reflected the values of participation and effectuation outlined by Michelman. She clearly prefers this approach arguing that "more enduring victories are to be won through the political system than can be wrung from a judicial elite alive to the weaknesses of its own

⁸³ See Weisbrod et al., Public Interest Law (1978).

⁸⁴ See C. Harlow, "Public Interest Litigation in England: The State of the Art", in J. Cooper and R. Dhavaan, Public Interest Law, (1986) 90 at 104.

unrepresentative status".⁸⁵ Yet it is clear that pressure groups do attempt to use the courts as part of their political lobbying and would use these actions more extensively if the various rules on financing litigation changed.⁸⁶

My conclusion is a relatively simple one. The technical rules on financing litigation and providing access to legal services cannot be severed from the broader issues of the socially desirable level of litigation in society and the social function of adjudication. These are issues which ought to be part of a broad public debate which can draw on but not be dominated by scientific expertise. This has certainly not occurred in England.

III

At this point it may be valuable to relate the issues raised in the paper to more general reflections on the nature of law in modern society. The liberal ideal of a neutral, uniform, and autonomous legal order gave a central role to courts and lawyers

⁸⁵ Id at p 133. An example of public interest action is the use of the Private Members Bill Procedure in the House of Commons. The Consumers Association for example forced the government to act on the issue of solicitors monopoly on conveyancing through this procedure and has secured a number of legislative successes through this mechanism.

⁸⁶ Tony Prosser in Test Case for the Poor (1982) provides an interesting descriptive account of public interest litigation by the Child Poverty Action Group.

as the custodians of the rule of law and conceived of legal reasoning as separate from politics and administrative fiat. By ensuring the impersonality of power it promised individuals freedom from domination except in accordance with the rules of the state. The post liberal state which redistributes and regulates is however also one in which there is increasing realization that private organizations may often wield significant governmental power. Roberto Unger argues that people may become conscious of what was always partly true, " that society consists of a constellation of governments, rather than an association of individuals held together by a single government."⁸⁷

He argues that this undermines several aspects of the traditional rule of law model. A central consequence is the undercutting of the distinctive identity of legal reasoning and legal institutions which begin to resemble administrative and political institutions. For example it is difficult to separate legal from political reasoning and adjudication may be conceived as simply part of a variety of techniques for achieving social goals. In addition, the sense that the state may be captured by private interests and the awareness of private power lead to movements for greater democratization of both public and private organizations. These communitarian aspirations may be part of a radical attack on corporate bodies or merely a reformist style of participation. These aspirations are certainly

⁸⁷ Unger supra at 000.

reflected in the current ideology of both the right and the left in the UK.

The description of consumer redress mechanisms was an example of Unger's argument, an illustration of the potential similarities between the lower courts and other "private" institutions. The recognition by the state of these institutions of private government obviously raises many difficult questions. A primary issue is whether they are really enlarging democratic rights of citizenship or are merely exercises in social control, "institutionalising and domesticating dissent".⁸⁸ Power may be exercised in many ways and institutions such as the insurance ombudsman may exercise an important role in communicating to consumers "proper" market values and in maintaining consumer confidence. These are important public roles. There has been much talk in recent years of developing participatory structures and democratic participation at all levels of society. Undoubtedly institutions such as the ASA and Ombudsmen can draw on this rhetoric. Their existence does suggest that we ought to explore further the role of these intermediate associations in addition to the traditional constituents of social order, community, market and state.

Examination of the work of the lower courts also seemed to exemplify Unger's argument. Are the courts instruments of social welfare, dispute settlers, adjudicators on rights? What will distinguish the more interventionist registrar from the

⁸⁸ Hirschman, supra at 000.

Ombudsmen? The continuities between courts and tribunals have been highlighted by other writers but there are few discussions of the rationale for the existing distribution of tasks between these organisations. A disputing perspective will tend to collapse distinctions between courts and other bodies apparently rendering unproblematic these difficult questions.

The search for community was an inspiration of early work on informal justice which was conceived as expressing the following values:

The preference for harmony over conflict, for mechanisms that offer equal access to the many rather than unequal privilege to the few, that operate quickly and cheaply, that permit all citizens to participate in decision making rather than limiting authority to professionals, that are familiar rather than esoteric, and that strive for and achieve substantive justice rather than frustrating it in the name of form.⁸⁹

On this view informal justice is a critique of rights talk and the individualistic vision of social relations upon which it is based. The consumer dispute processing mechanisms discussed in this paper do not however seem located in any communitarian vision of justice; they are for example generally bureaucratic and staffed by experts. The limited developments of ADR in England have rarely reflected communitarian values. They have been closely tied to existing state institutions and have been staffed by professionals. If we want to understand community justice then we should undertake detailed ethnographic studies of communities. Introducing a neighborhood justice centre and then

⁸⁹ R. Abel(ed.), The Politics of Informal Justice, at p 310.

attempting to measure its effectiveness seems to this writer to be starting in the wrong place.

Finally, there is the political nature of reform. In a well known article Kahn-Freund argued⁹⁰ that the primary factor which would determine the success of legal transplants from one jurisdiction to another was the relationship of the institution to the organisation and distribution of power. In his view the organisation of the courts and the legal profession and the law of procedure were all central aspects of the allocation of power thus courting the danger that any transplant would be rejected which challenged the existing power structure as reflected in these institutions. Recognition of the political nature of reform suggests that careful attention should be paid to the process of reform. An impressionistic view of much current reform is that it is often technocratic-- that is to say-- dominated by experts (lawyers or occasionally "hard" social scientific methods). There is little involvement of the public or the communities who will supposedly benefit from new forms of dispute settlement. In addition academics ought to be sensitive to the political implications of the particular paradigm which they adopt to study civil justice, the courts and the community and its relationship to political agenda. These are hardly novel comments but are worth repeating at a time when a research agenda is being established in Canada.

⁹⁰ "On Uses and Misuses of Comparative Law" (1974) 37 Modern Law Review 1.



Conference
on Access to
Civil Justice

Congrès sur
l'accès à la
justice civile

ACCESS TO CIVIL AND ADMINISTRATIVE JUSTICE IN QUEBEC

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ACCESS TO CIVIL AND ADMINISTRATIVE JUSTICE IN QUEBEC

Court proceedings offer so little chance of success that they should be the subject of a warning sign labelled "dead end street".¹

INTRODUCTION

The issue of access to civil and administrative justice in Québec requires, as anywhere else in the world, that a distinction be made between a citizen's right to ask a court to adjudicate on his rights and the undeniable truth that most citizens cannot afford protracted and costly litigation.

Access to justice in Québec is predicated on the exercise of the fundamental right of any litigant to be heard by a civil court, in accordance with Section 5 of the Code of Civil Procedure² (hereinafter referred to as "C.C.P."), which provides:

No judicial demand can be adjudicated upon unless the party against whom it is made has been heard or duly summoned.

This fundamental legal right has been more broadly enshrined in the first paragraph of Section 23 of the Québec Charter of Human Rights and Freedoms:

Every person has a right to a full and equal, public and fair hearing by an independant and impartial tribunal, for the

determination of his rights and obligations or of the merits of any charge brought against him.³

Such a fundamental provision is mere wishful thinking unless citizens are in fact given full access to the justice system. One American legal scholar commented upon the extent of the right to be heard in his own country as follows:

Procedural due process protects their rights to be heard - a right which is considered fundamental to our notions of fair play and justice. However, the right to be heard is meaningless unless an individual can gain access to the court in order to present or defend his claim. (Brickman, Of Arterial Passageways Through Legal Process, (1973) 48 New York University Law Review, p. 598)⁴

In assessing the meaning of a person's right to be heard and the ability of the judicial system to do so, one must take into account a citizen's degree of access to the courts.⁵

In Québec, increasing access to justice seems to have been the concern of the successive Justice Ministers for more than fifteen years. In the 1975 White Book on Justice Administration in Québec, the Honorable Jérôme Choquette stated the following with respect to the (then) recent reforms:

The justice system has been made more socially conscious and more accessible to all citizens. Notable changes include the statute promoting access to justice (the Small Claims Act), the Legal Aid Act and the Criminal Injuries Compensation Act. The

latter has recognized the responsibility of society as a whole for the victims of criminal acts.

The legislature has also created new institutions such as the Ombudsman to permit a simple, fast and fair redress in respect of acts of the government.

Four years later in a speech given at the annual convention of the Québec Bar, the Honorable Marc-André Bédard stated:

It is worth noting that access to justice is the first and foremost right of citizens. The possibility of seeking redress must override all other concerns and no obstacle should prevent a citizen from choosing what he or she feels to be the most adequate means of presenting his or her claim.

Later in his speech, the Minister offered his vision to the lawyers gathered at the convention on what should be the justice system of the eighties:

A system of justice where equal opportunities may be pursued in a human environment, rights that are effectively protected, stated and understood clearly, universal access to the court system, such is the concept of justice for the eighties. This is our objective and every officer of the court, including yourselves, must strive to achieve it. The ideal of justice will always require further development; what really matters is to work towards its implementation.

So much for words. But since we are at the tail-end of the eighties, it is worth examining the action taken by Québec legislators and other actors in the justice system to improve access to judicial services.

The issue of access to justice cannot be dealt with in Québec, nor anywhere else for that matter, without addressing the issue of access to so-called administrative justice. The reference here is to the existence of a vast array of administrative tribunals established over the years in response to the perceived inability of traditional courts to apply public welfare legislation.⁹

The purpose of this presentation is not to dwell upon the various problems arising from the excessive number of administrative tribunals or from the overabundance of procedures which they follow. Suffice it to say that these institutions undermine the fundamental purpose for which they were created, i.e. improving access to justice. In his report entitled Les tribunaux administratifs - L'heure est aux décisions, presented to the Québec Minister of Justice in 1987, the Task Force on administrative tribunals highlights the overriding objective of its proposed reform as follows:

In this era of mass administrative justice, such as in public welfare cases, access to redress mechanisms is a major goal. The individual is first entitled to know where his or her remedy lies in order to present a claim. The complexity of statutes, the vast number of small, nearly invisible agencies, all forming a sort of "alphabet soup" or "legal hodgepodge", would seem to jeopardize the very *raison d'être* of administrative tribunals. If some amalgamation of agencies

must be contemplated, it is not to draw a prettier organization chart but to simplify access to administrative justice and to strengthen those institutions that offer the strongest assurance of expertise and credibility. There is no need to blame the various departments or governments for having set up over the years a number of agencies in response to particular demands. However, the time has come to look at the situation in a broad perspective in order to determine whether, in today's context, and having regard to the high number of cases presented to these institutions, some adjustments would not be desirable, useful or even necessary.

How, in fact, can one speak of access to justice when some leading administrative tribunals such as La Commission d'appel en matières de lésions professionnelles (the CALP), which has overriding jurisdiction over all decisions made with regard to workers' compensation claims, fail to deliver justice expeditiously and efficiently? A recent newspaper article in La Presse, stated that "Depuis ses débuts en 1985, la CALP a été saisie de quelque 7,300 dossiers et moins de la moitié ont été réglés".¹¹ Further on in the article, the reporter noted that data provided by the Commission "révèlent également que le délai moyen entre l'inscription de la cause et la décision que rend ce tribunal est supérieur à 12 mois".¹² The reporter goes on to say that "On note de très nombreux délais de 15 à 18 mois et quelques autres allant jusqu'à 21 et même 25 mois".¹³ It would seem then that administrative justice is plagued just like conventional courts by the lengthy delays in processing

cases.

Access to justice in Québec remains a continuous concern. We are aware that well-to-do people in our society don't face, for obvious reasons, the same aggravations. On the other hand, the unprivileged while suffering from lack of information and delays in justice, are however able to avoid the costs aggravation to a large extent through the legal aid system.¹⁴

However, the problem of access to the court system and to legal services in general remains unmitigated for middle-class people as well as for some of the unprivileged, since the criteria for legal aid eligibility, however stringent, have not been updated since 1985.¹⁵

It is a well known fact now that the political community has openly endorsed the ideal of access to justice during the last few years¹⁶. Admittedly concrete steps have been taken to achieve such an ideal:

It should be noted that even without knowing the profile of users of the judicial system, the last few governments have attempted to make justice more accessible to underprivileged citizens by establishing Small Claims Courts (1972), the Legal Aid System (1972) and Class Action Procedure (1978). The Legal Aid Act provides that citizens with limited financial resources are

eligible to obtain free legal services from lawyers working for the Legal Aid Commission or in private practices. This social measure provides greater access to judicial services for those citizens most severely lacking in financial resources. However, access to justice remains a problem for those citizens whose income slightly exceeds the eligibility limit for legal aid services.

The last statement indicates that in spite of the recent improvements, there still remains a gap between political rhetoric and reality in terms of universal access to justice, especially for middle-class people.

In Québec, the concept of access to justice has not generated as much specialized literature as in other countries such as in the United States. What we are lacking, for instance, is credible and empirical studies on the issue. Research efforts have mainly originated so far from the Québec Department of Justice, as well as from the Commission des services juridiques (Legal Services Commission), which is responsible for the administration of the Legal Aid Act. These efforts have been directed especially towards the needs of our society's unprivileged, while omitting those of middle-class people.¹⁸

In spite of the paucity of literature on the subject, it is readily acknowledged that the issue of

access to justice as it applies to middle-class people hinges on a number of factors mainly associated with the complexity of the adjudication process in both traditional courts and administrative tribunals, with the length of time required to get a case on the hearing list and decided upon by some of these institutions and, last but not least, the sometimes excessive cost to be borne on occasion by individuals in order to obtain justice.

In this presentation, we shall first summarize the status of the issue in Québec with respect to each problem in particular. The second part of this presentation will provide a survey of the concrete steps taken over the last twenty years in order to facilitate access to the court system before turning to certain reform proposals aimed at improving the situation.

I- PROBLEM DEFINITION - ACCESS TO THE JUSTICE SYSTEM

The principle of access to justice is tied to the more fundamental right to equality before the law which is generally known as meaning that citizens, whether rich or poor, can all call upon the courts to enforce rights specifically provided by the law.

However, the concept of access to justice,

which has been recognized in liberal societies at the end of the eighteenth century as a fundamental and natural right, remained without practical application in reality. The State operated then under a policy of laissez-faire with the result that the exercise of this presumably "natural right" was limited to well-to-do people:

The theory was that, while access to justice may have been a "natural right", natural rights did not require affirmative action for their protection. These rights were considered prior to the state; their preservation required only the state did not allow them to be infringed by others. The state thus remained passive with respect to such problems as the ability, in practice of a party to recognize his legal rights and to prosecute or defend them adequately. (Cappelletti and Garth, Access to Justice, Milan, Dott, 1978, pp. 6-7)¹⁹

The development of the welfare state in the twentieth century has resulted in this right becoming less theoretical since it has then become incumbent upon the state to ensure that social and economic inequalities would not prevent equal access to justice.²⁰

In Québec, as anywhere else, steps have been taken to achieve this objective as will be shown in the second part of this presentation. The fact remains, though, that a person with limited financial resources and, yet, not eligible for legal aid, must think twice before bringing a case before a judicial or

administrative tribunal, with the result that the person will hesitate or simply omit to exercise his right.

The decision and the hesitation to litigate will be based on such consideration as the high cost of going through the legal process, the complexity of the judicial and administrative system as well as the substantial delays to be expected in specific types of cases.

A) The cost factor

There is no doubt that the costs incurred in litigating are the major barrier in providing equal access to justice.²¹

In Québec, legal proceedings are subject to two types of costs. First of all, one has to consider court fees, including those charged by the Justice Department as part of its responsibility to provide the services of Registrars for recording various procedures, then there are the fees charged by sheriffs and bailiffs for serving documents on the opposite party to legal proceedings, and there are those associated with the court tariff of fees to pay witnesses for their attendance in court.

Let us now consider the fees charged for filing procedural documents through which the justice system is partly financed. An interesting aspect is that in certain cases the fees charged by the government have made quantum leaps. For instance, in 1982 the tariff of fees in effect in courts having jurisdiction over civil matters provided for a payment of \$50 as a condition for filing with the Registrar of the Québec Appeal Court a notice of appeal from a final judgment rendered by a lower court.²² In 1985, barely 3 years later, this fee jumped by 120% to \$110.²³ In 1986, less than a year later, the same fee reached \$140!²⁴ Over a period of two years, the government whose Justice Ministers claimed to have improved access to justice²⁵ managed to triple the cost of filing court documents.

Arguably, the government was aiming to limit the number of frivolous appeals while increasing its revenues in times of budgetary constraints; however, such action can hardly be reconciled with official rhetoric on access to justice... This example alone clearly shows the cost-related problems facing individuals.

Unfortunately, an unsuccessful litigant is not only liable to pay court fees but also counsel fees.²⁶ In Québec, there is little to regulate this

aspect of litigation costs. In fact, we can almost speak of a totally deregulated situation. The Act Respecting the Barreau du Québec which governs lawyers in the Province²⁷ has given rise to two fairly short regulations on the subject. The first one entitled Tariff of Certain Extra Judicial Fees of Advocates allows the collection of a contingency fee in debt recovery cases.²⁸ (Translator's note: Advocate has the meaning of lawyer.)

The other regulation made pursuant to the Act Respecting the Barreau du Québec, is the Code of Ethics of Advocates. It governs the computation of professional fees charged by lawyers other than those fees covered by the above mentioned regulation. Two provisions in the Code of Ethics set out the criteria used in establishing those fees:

"3.08.01. The advocate must charge and accept fair and reasonable fees.

3.08.02. The fees are fair and reasonable if they are warranted by the circumstances and correspond to the services rendered. In determining his fees, the advocate must in particular take the following factors into account:

- (a) his experience;
- (b) the time devoted to the matter;
- (c) the difficulty of the question involved;
- (d) the importance of the matter;
- (e) the responsibility assumed;
- (f) the performance of unusual services or services requiring exceptional competence or celerity;
- (g) the result obtained;
- (h) the judicial and extrajudicial fees fixed in the tariffs".

Understandably, it would have been difficult to establish more precise standards than those mentioned above and this is why it is difficult to assess with any degree of accuracy the real costs involved in providing access to justice. The best way of measuring these costs would be to peruse the Department of Justice data bank using a broad sample of cases brought to conclusion over the last year and to send a survey form to former litigants in order to gather data on the costs that these parties incurred.³⁰ This empirical type of research would to some extent remedy the lack of existing material on the costs of providing justice in the Province of Québec.³¹

The popular belief remains that justice is an expensive proposition. The cost issue is an important one in deciding whether to bring someone to court and this issue often overrides the values at stake.³²

B) The complexity of the judicial and administrative system

It is quite conceivable that an individual might hesitate before exercising his or her right to initiate proceedings before a judicial or administrative tribunal not only because of the costs involved but also because the justice system is

generally viewed as a maze, where not only is it difficult to find the way out but where even the entrance is not obvious or at least the right entrance...

Some might refute this assertion by saying that the lawyer's role is precisely to guide individuals through the maze, except that lawyers themselves sometimes will admit to having a difficult time finding their own way through it.

The complexity of the adjudication process in Québec starts with the traditional courts, i.e. those coming under the Courts of Justice Act.³³ The Honorable Jérôme Choquette had already pointed out this problem and its unwanted consequences in the 1975 White Book on the Administration of Justice:

Describing the court system suffices to show the following problems: the large number of courts, the wide variation in jurisdictions, the fixed location of the judges.

As noted, there exist several different courts, even at the level of courts with provincially appointed judges: the local Criminal Court, the Provincial Court, the Welfare Court, the municipal courts, the Magistrates' courts. If we add to this list the Superior Court and the Court of Appeal - the Federal Court and the Supreme Court of Canada being outside the scope of our analysis - we can see why a user of the justice system can become confused.

The complexity of the system is not due only to the number of courts; it arises as well from the wide variation of civil and criminal jurisdiction among the courts and the judges.

Civil actions may be tried by one or more of the Superior Court, the Provincial Court and the Municipal courts, which sometimes have exclusive, sometimes concurrent jurisdiction.

The number of courts and the variation of jurisdiction too often lead to conflicts over the precise limits of the responsibility of each court (or of its judges). This is a particularly unfortunate cause of pointless proceedings as the party tries to find a judge with the legal right to decide the dispute that the party wants to have resolved.

It should be noted however that the Code of Civil Procedure provides that where a claim is taken to a provincial civil court lacking jurisdiction to hear the matter, the claim may then be referred, without being dismissed, to another provincial tribunal having the appropriate jurisdiction.³⁵ On the other hand, if the matter should have been referred to a court outside the provincial realm, as for instance the Federal Court of Canada, no transfer is possible and the claim will fail at the outset.³⁶ The complexity of the court system in Québec combined with the sometimes fatal consequences of a jurisdictional error are also factors that would make the ordinary individual think twice about exercising his right to litigate.

However these problems are nothing compared to the procedural nightmare caused by the so-called administrative tribunals set up at the turn of the century in the wake of the development of the welfare state.³⁷ At the beginning of this paper we quoted the report of the Task Force on Administrative Tribunals which used in its introductory statement the words "a real alphabet soup" and "a legal hodgepodge" in order to describe the complex structure of administrative tribunals as well as the roadblocks to overcome in accessing these institutions.³⁸

This report, while pressing for interesting reforms, offers a vast amount of topical information and estimates at 78 the number of administrative tribunals having jurisdiction in the Province of Québec.³⁹ The list of these tribunals is attached to this paper as Appendix I.

In some cases, a number of these administrative tribunals have been found to exercise overlapping jurisdictions! For instance, and this fact has been extensively commented upon by the Task Force on Administrative Tribunals, two of these institutions exercise overriding jurisdiction over occupational injuries and diseases cases. For instance, La Commission d'appel en matière de lésions professionnelles (CALP) referred to earlier in this

paper⁴⁰, was established under the Act Respecting Industrial Accidents and Occupational Diseases passed in 1985, in substitution for the Commission des affaires sociales and for the purpose of hearing and disposing of workers' compensation cases exclusively in accordance with its founding Act.⁴¹

In workers' compensation cases, claimants and their lawyers must remember, however, that the Commission des affaires sociales retains jurisdiction over appeals brought under Section 65 of the Workman's Compensation Act⁴² in relation to accidents that occurred before the coming into force in 1985 of the Act Respecting Industrial Accidents and Occupational Diseases.⁴³ Such instances of overlapping jurisdictions have been the focus of criticism by all participants who presented position papers on the issue to the Task Force on Administrative Tribunals.⁴⁴

On the other hand, the Task Force notes that certain administrative tribunals have such a low profile that no one has ever presented a case to them since their inception! For instance, the Charter of the French Language passed in 1977 requires that private firms with 50 employees or more obtain a certificate of "francisation" from the Office de la langue française provided they meet the conditions of issuance of the certificate. If the Office de la

langue française refuses to issue a certificate, the affected firm may appeal the decision to the Commission d'appel sur la francisation des entreprises (the Appeal's Committee).⁴⁵ Interestingly enough, according to the Task Force report, this committee has not heard any appeal between 1977 and 1987 and has no operating budget⁴⁶. Thank goodness!...

Instances of overlapping jurisdictions or hidden adjudicatory powers exercised by certain institutions are too numerous to be counted. It is hoped that some of the reform proposals put forward by the Task Force, the details of which will be discussed in the second part of this presentation, will soon see the light of day. The Task Force members have in fact stated in their own report that:

...access to redress mechanisms is a major goal. The individual is first entitled to know where his or her remedy lies in order to present a claim.

C) Excessive slowness of process

Much has been written about the amount of time required before a case is heard and decided upon by judicial or administrative tribunals, and especially about the resulting wait and other inconveniences suffered by litigants.

The situation in traditional courts is well summed up by the Honorable Jérôme Choquette in an excerpt taken from the 1975 White Book wherein he describes the inconveniences associated with the slowness of the justice process:

When the time limits are unduly long, the parties are not only prevented from enjoying their rights immediately but put at risk of losing them completely. The longer the delay, the greater the difficulty in locating witnesses, whose memories become in turn more and more vague. It is inconceivable that the victim of a crime should have to wait four years or more to receive the compensation to which he or she is entitled. If justice is not done in a reasonable time, it cannot really be said to be accessible to those in search of it. To avoid the inconvenience of these delays, the parties may often be obliged to accept an unfavourable settlement. This constitutes in fact a denial of justice.

As Minister of Justice at the time, he goes on to identify four areas of substantial delays: the preparations for trial (i.e. the period for putting together the necessary pleadings), those caused by the backlog of various claims filed with the courts, those associated with the postponement of cases and finally, those resulting from judgments reserved by judges.⁴⁹

These problems have plagued the system for a long time. For instance, early in 1984, an article entitled The long Wait for Justice written in Toronto's McLean's magazine and dealing with the slowness of the justice process in major urban areas such as Montreal,

Toronto and Vancouver, gave the following account of the situation in the Province of Québec:

The outlook is bleak for Quebecers hoping for a prompt and speedy day in court. People who launch civil actions for such claims as medical malpractice and breach of contract now have to wait more than seven years for a hearing in the Québec Superior Court. According to statistics released in Québec City by Liberal justice critic Herbert Marx last month, a heavy trial backlog has pushed the waiting periods for civil cases from four years last January to seven years by last October. And although legal experts agree that Québec's delay in civil litigation is the worst in the country, judges, lawyers and court administrators in all provinces say that the backlog across Canada is worsening and represents a threat to the rights of both victims and accused.³⁰

To set the record straight, let it be added that the time periods in question were related only to cases scheduled for several days of hearing and filed exclusively with the Superior Court in the District of Montreal. Nevertheless, it was quite usual in the seventies to wait three to four years to have one's case heard in court. And the persons most inconvenienced by these delays were certainly not the well-to-do people. At any rate, the second part of this presentation attempts to demonstrate how substantial improvements have been made in Québec in this regard during the last years.

Unfortunately, according to statistics released in the report of the Task Force on Administrative Tribunals, the same cannot be said of

some administrative tribunals, in spite of the fact that these institutions were intended to lighten the case load for judicial tribunals in certain areas of adjudication:

The rationale for creating administrative tribunals is obvious: we tend to favour a more accessible, expedient and less costly adjudication process than conventional courts can offer with the advantage of being removed from political influence, sufficiently formal in terms of due process and possessing the necessary expertise and multi-disciplinary approach.

However, the data published in the same report reveal that some of the most trying periods of wait which individuals must endure in dealing with some of the institutions literally undermine the ideal of access to justice.

For example a leading administrative tribunal in Québec, i.e. the Régie du logement (or Residential Tenancies Board) which is responsible for settling conflicts between landlords and tenants. The report of the Task Force on Administrative Tribunals states that in 1986 the Board entertained 78,732 cases out of which 45,151 decisions were handed down by members of the Board, or an average of one decision for every second claim received by the Board.⁵² Furthermore, according to the same report, the time period between the reception of a claim and the issuance of a decision by a member of the Board averages 86 days.⁵³ Accordingly, landlords and

tenants, most of whom are from the middle class, face lengthy processing periods. While it takes nearly three months for a small landlord to obtain a decision ordering his or her tenant to pay rent arrears, the landlord must deal with possibly serious problems vis-à-vis his mortgagee who is not required to go through the Board to recover mortgage arrears.

Yet, landlords are much better off than victims of occupational accidents. Where such victims wish to challenge the amount of compensation awarded by the Commission de la santé et la sécurité au travail (formerly the Commission des accidents du travail or Workman's Compensation Board), they must file an appeal with the Appeal's Committee of the Commission. As noted in the introduction to this presentation, the Appeal's Committee still has not heard half the cases referred to it since its creation in 1985.⁵⁴

One should mention also the Commission des affaires sociales which, according to statistics provided by the Task Force on Administrative Tribunals, took on average 810 days, i.e. more than two years, between 1985 and 1986, to process appeals from victims of criminal acts who were dissatisfied with the amount of compensation initially awarded in the first instance.⁵⁵

Obviously the adjudication process provided by major administrative tribunals is disproportionately long and because of the statutory authority these institutions enjoy in welfare matters, the delays have a direct impact on the middle class and the unprivileged (small landlords, tenants, victims of work injuries, state pensioners, etc...).

Faced with the prospect of having to foot a lawyer's bill, individuals not eligible for legal aid are likely to decline the right to litigate or to even abandon proceedings.

II- EXISTING SOLUTIONS AND POSSIBLE AVENUES OF REFORM

In Québec, the issue of access to justice is not simply a question of rhetoric but is also being addressed through tangible steps taken over the last 20 years. First there was the development of a legal aid^{5 6} program in 1972 geared especially towards the needs of the unprivileged, albeit not the middle class. The rationale for the program is thus self-explanatory.

Other steps have been taken by the State for the benefit, in theory at least, of all classes of the population. These steps include, for instance, the establishment of a procedure for the recovery of small claims to be detailed further on. They include also

the class action procedure, as well as state-run system for the collection of support payments. This quick overview of recent measures aimed at improving access to justice will be followed by a few suggestions for reform in terms of improving access to justice for middle-class people in the case of both judicial and administrative tribunals.

A) Existing Solutions

1- Recovery of small claims

In 1971 the National Assembly of Québec passed an Act to Promote Access to Justice adding to the C.C.P. a new part entitled "Recovery of small claims".⁵⁷ From that point on, an individual (as opposed to a corporation) wishing to recover a debt not exceeding \$300 (at that time) from a debtor residing in Québec, had to file a statement of claim in the Small Claims Division of the Provincial Court. That amount has since been increased to \$1,000.⁵⁸

These changes mean in practical terms that an individual wishing to recover from a debtor residing in Québec an amount not exceeding \$1,000 must simply attend the office of the Registrar of the Provincial Court, Small Claims Division, to state his claim before the Registrar and, if the Registrar is satisfied as to

the form of the claim, to sign the statement of claim which will be sent by registered mail to the debtor by the Registrar.⁵⁹ The creditor may also prepare himself the statement of claim and file it with the Registrar.⁶⁰ The creditor will then be required when filing his documents to pay a registration fee of \$15 for claims up to \$250 or a fee of \$25 for claims exceeding \$250.⁶¹

This procedure is very much simplified in comparison to the rules governing ordinary court actions. Also, in small claims cases, the creditor may be represented by an agent who is unpaid and a non-lawyer.⁶² The legislator has thus chosen to keep lawyers away from small claims court in order to keep the costs down for litigants.

If the debtor challenges the claim, the case will be heard by a judge of the Provincial Court who, while observing the rules of evidence, will conduct without the assistance of counsel the examination of parties and witnesses.⁶³ The ensuing judgment will be in writing and is not subject to appeal.⁶⁴

It is worth noting in this context that the legislator in Québec intended to limit access to the small claims courts to claimants that are individuals in order to prevent the situation which developed in

the United States where the lack of such a restriction facilitated access to justice for corporations and affluent creditors to the disadvantage of less affluent debtors. In fact, the American small claims court became the favorite forum, or so it would seem, for money lenders and business people seeking inexpensive ways of recovering money:

The small claims court, although originally envisioned as a judicial forum for redressing grievances of individuals who could not afford a lawyer, now functions primarily as a collection agency for business. Most of the plaintiffs are businesses collecting debts from individual citizens; individual plaintiffs make up a very small portion of those who utilize small claims courts.⁶⁵ (Eovaldi and Meyers, The Pro Se Small Claims Court in Chicago: Justice for the Little Guy?, (1978) Northwestern University Law Review, p. 948)

By limiting small claims access to claimants that are individuals, the Québec legislator found a way to ensure that ordinary citizens would effectively benefit from increased access to civil justice.

But access to justice also depends on reduced user cost, a simplified procedure as well as, because of the exclusion of lawyers from small claims courts, the absence of extra-judicial fees.

The exclusion of lawyers from small claims court has generated strong protests. Questions were asked, for instance, as to whether it was not

contradictory to set up by statute a small claims recovery system in order to facilitate "access to justice" and to exclude in the same statute lawyers who like judges and registrars are court officers.⁶⁶

It is also worth noting that existing case law on the subject leads also to contradictory results. On the one hand, the Supreme Court of Canada has found that the Québec National Assembly was acting within its constitutional powers in prohibiting lawyers from having access to small claims court.⁶⁷ On the other hand, since under Section 956 of the C.C.P., a corporation named as a defendant in a small claims action can only be represented by an employee working exclusively for that corporation, the corporation is entitled to representation by a lawyer provided the lawyer is an employee of that corporation.⁶⁸ It also means that if an individual sues Bell Canada in small claims, the company can call upon her resident lawyers to appear in small claims on its behalf... Such circumstances leads to the unavoidable consequence that both parties to the proceedings, the individual plaintiff and the defendant corporation, both enjoy easy access to justice, but with the corporation represented by a resident lawyer being in a privileged position in relation to the unrepresented plaintiff. American studies have in fact shown that where a defendant was represented by a lawyer in small claims,

the chances of having the plaintiff's claim struck down or to have the plaintiff drop the case were increased.⁶⁹

In 1984, the National Assembly has added a provision to the C.C.P. allowing parties to appear through counsel in small claims courts with the consent of the Chief Justice of the Provincial Court, where complex issues of law arose from the matter being litigated. In such circumstances, the fees and disbursements charged by the lawyer are to be borne by the Minister of Justice to the extent provided by the tariff of fees applicable to legal aid services.⁷⁰ The compromise is a worthy one since the litigants enjoy better access to justice without having to pay more.

2- Class Actions

As most people are aware, the class action procedure allows a vast and undetermined number of individuals to bring an action in court against a defendant to litigate a common issue without being individually named.

Québec was for a while the only province in Canada where this type of action was not admissible.⁷¹ The National Assembly corrected this deficiency by enacting in 1978 an Act Respecting the Class Action

which came into effect in 1979.⁷² In Québec, the class action procedure allows an individual, the "representative", to bring an action in court not only on his own behalf but also on behalf of all persons affected by the same legal problem without their consent. The Québec procedure parallels closely the American model derived from the Federal Rules of Civil Procedures and the New York State Rules of Civil Procedure.⁷³

A person wishing to act as representative for other members of a reference group for the purpose of bringing a class action must however seek leave to do so from the Superior Court of Québec.⁷⁴ Such authorization is only granted if the applicant (or "member" of the group) shows that he meets the requirements of section 1003 of the C.C.P which provides that:

The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:

- a) the recourses of the members raise identical, similar or related questions of law or fact;
- b) the facts alleged seem to justify the conclusions sought;
- c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and
- d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members

adequately.⁷⁵

If the request is granted, the member then becomes the "representative" for the group and may then bring a class action in accordance with the regular procedure.

It should be added that the legislator has provided for financial backing for a representative wishing to bring a class action where the action is likely to be challenged by a defendant with more financial resources than the representative, in order to overcome the high cost for the representative. A government agency named le Fonds d'aide aux recours collectifs, established under the Act Respecting the Class Action, is responsible for providing financial assistance to anyone wishing to be designated as a representative in a contemplated class action suit, provided that reasonable and probable grounds exist for the class action.⁷⁶ Once approved, the financial assistance may be used to cover among other things, court cost, professional fees and various disbursements incurred by counsel on behalf of a representative, including the costs related to the publication of notices in the media and to the provision of expert opinion.⁷⁷ A decision of the Fonds d'aide refusing financial assistance to the representative is appealable to the Provincial Court.⁷⁸

In reality, and in spite of the initial difficulties met by judges in implementing this new procedure, the class action procedure is gaining ground in Québec especially among consumers, victims of illegal strikes as well as among people wishing to challenge the validity of subordinate legislation. The aim of improving access to justice is well served through this new tool.

3- State collection of support payments

The Province of Québec like many other jurisdictions experienced during the seventies severe problems with regards to the collection of support payments. Normally, the receipient of support payments would have to hire a lawyer to garnish the property or income of the debtor. This practical requirement had the effect of subjecting the receipient to substantial costs and lengthy legal procedures as well as discouraging creditors (mainly women) from claiming arrears of support payments and causing them to rely on social welfare as a stop-gap measure.

This is why the National Assembly passed in 1980 an act amending of the C.C.P. entitled an Act to Promote the Payment of Support providing for the establishment of a government supervised system for the collection of support payments.⁷⁹

As a result, judicial officers working under the direction of Court Registrars were given responsibility to collect support payments. These collectors are in effect civil servants empowered by the Minister of Justice to garnish a debtor's property or income on behalf of the person entitled to support payments awarded under the authority of a court. There are over fifty collection officers throughout the various judicial districts in Québec who perform this duty for the population.⁸⁰

Of course, the creditor is not required to deal exclusively with the state collectors. The legislator chose not to create a mandatory collection system for all support payment creditors because of the high costs involved and the government's policy of minimum intervention. Under such a system even good debtors would presumably have been obliged to make the support payments to the government's collection office which in turn would have transferred it to the creditor! As it is, the person entitled to support payments can always have a lawyer take garnishment action on his or her behalf except that the person will be liable for the lawyer's fees. However, if the receipient chooses to bring his or her claim to the government collection office, there are no fees to pay which makes all the difference in the world.

Where the support payment creditor chooses the second option, what is then the collector's role? The first paragraph of Section 659.3 C.C.P. specifically provides for the collector's role:

The collector of support payments of the district in which the judgment was rendered acts as seizing creditor for the judgment creditor; he may also enter any proceeding aimed at favouring the execution of the judgment.

This provision enables the collector, for instance, to garnish the property and wages of the person owing support payments as well as in certain cases to counter a challenge from the person.

This major social initiative has improved access to justice in Québec according to a study made by the Québec Department of Justice on the operation of this service over the last five years.⁸¹ This study is based on the examination of a broad sample of court files relating to support payment orders. On examination of these files, it appears that 80% of support payment creditors seeking payment of arrears rely on the government collection service rather than lawyers.⁸² It would seem that the use of this service results in total or partial recovery of the amounts due in nearly 66% of cases.⁸³ The figure is very revealing since before the 1980 reform only 25% of support

payments orders were presumably complied with.⁸⁴ There lies also another improvement in the level of access to justice in Québec.

Small claims courts, class actions, enforcement of support payments, are some of the initiatives aimed at giving all Quebecers improved access to judicial services. In the first case, the user costs are extremely low (\$15 to \$25 depending on the amount claimed), in the second, subsidies may be granted by a governmental service to cover costs and in the third the use of government services is free of charge. These costs are a far cry from the astronomical ones charged to individuals in ordinary court actions.

4- Reducing time periods in civil tribunals

The measures aimed at reducing the cost of judicial services described above are supplemented by other specific ones taken by the legislator and even judges to substantially reduce waiting periods in civil tribunals, in an attempt to remedy the nightmarish situations they were creating for a number of individuals, as indicated earlier.

First, a series of amendments were made to the C.C.P. in the past few years. They were described

as follows by the Honorable Allan B. Gold, Chief Justice of the Superior Court of Québec at a seminar on access to justice held at the University of Montreal in 1987:

I am sure you are aware of the results I am referring to: amendments to the Code of Civil Procedure providing for full disclosure of evidence, expanded discovery procedures, production and exchange of reports and exhibits, pre-trial conferences conducted in a constructive manner by the Law Society and retired judges and all other necessary incidentals including, in certain cases, evidence by affidavit, and the taking of out of court evidence; all these steps should ensure that a case is well prepared and ready to proceed to trial without requiring time extensions.

In order to supplement these legislative amendments, judges of the Superior Court of Québec which is the court of general jurisdiction in the province, have adopted specific rules of procedure providing that it is incumbent upon counsel for the parties to demonstrate that the court file is complete before the case can be set down for trial. This being done, the prothonotary of the Superior Court will then issue a certificate of readiness for trial allowing the case to be set down on the court's trial list.⁸⁶

These reforms have contributed to a substantial reduction of the waiting periods in courts, so much so that Judge Gold made the following assessment of the Superior Court, together with an interesting prediction for Québec court users:

Today, things are going well. Certainly, we are more congratulated than blamed. The backlog has been reduced from five and even sometimes six or seven years to an average of five months. It is our hope and conviction that in a short while we will achieve our ultimate goal of offering, as in other professions, trials by appointment.

One could hardly deny that substantial progress has been made in Québec in improving access to justice at all levels of the justice system particularly in terms of reduced costs and time periods. We turn now to the various measures which might further improve the situation.

B) Possible avenues of reform

What can be done in Québec to further improve access to justice? One could for instance reduce or limit the tariff of fees presently charged by court registrars for filing court documents. One could also increase the monetary limit of \$1,000 applicable to small claims actions in Provincial Court. Also worthy of examination is the development of prepaid legal services for workers employed in commercial firms. There is also the requirement to simplify the structure of judicial and administrative tribunals. Access to the appellate bodies should be improved as

well.

1- Court filing fees

In the first part of this presentation, we have attempted to demonstrate that through the numerous and substantial increases in the fees charged for the filing of certain pleadings, the government had in fact restricted access to justice.

Without going as far as to suggest that nominal fees only should be charged, with the possible risk of creating an incentive for filing frivolous documents, it is nevertheless our opinion that the government should review the tariff of fees in effect in the justice system in order for the government to lead the way in cost reduction measures.

2- Increasing the jurisdiction of the Small Claims Division of the Provincial Court

As indicated earlier, in 1972 the jurisdiction of the Small Claims Division of the Québec Provincial Court was pegged at \$300 to reach 13 years later \$1,000.⁸⁸ Yet, this monetary limit is the same as the one that was in force in British Columbia back in 1974....!⁸⁹

In a report on the court system in Ontario, the Honorable Judge Thomas Zuber recommends a substantial enlargement of the jurisdiction of small claims courts in Ontario from the present limit of \$1,000 (\$3,000 in Toronto) to \$10,000.⁹⁰ Considering the relative success of the small claims procedure in Québec we would as for ourselves contemplate an increase to \$3,000. The legislator could by the same token allow litigants to be represented by counsel or by a law student having the proper qualifications. Some might argue against this change because of the possibly heavier cost burden on court users and increased waiting periods. In answering this objection, it should be pointed out that a number of studies performed in Canada show that few people retain counsel for small claims action.⁹¹ As for the level of fees that lawyers might charge for such services, it might suffice to set strict limits as certain provinces have already done.⁹² At any rate, access to justice is not just a matter of costs but also a matter of quality of the services provided.

3- Prepaid legal services

Much has been said on the subject of prepaid legal services as a way to allow employees in a firm to have free access to legal services under their collective agreement, with the employer contributing

financially to the legal services plan. Such a plan might allow, for instance, a large segment of a low income population not eligible for government-funded legal aid to have better access to justice.

In Québec, the scheme is little known and hardly used while in other countries such as the U.S.A. it has been in effect for quite a while.⁹³ In Canada, the best known type of legal services plan is the one that the Canadian Union of Automobile Workers (affiliated to the United Auto Workers) has negotiated with the major automobile manufacturers (General Motors, Ford, Chrysler). The contract means that Québec workers employed in particular at the General Motors plant in Ste-Thérèse who have at least one year's seniority would have access to the free services of a lawyer in a number of cases provided that the lawyer has entered into an agreement with the Plant Management Office whereby his services would be paid by the plan. The features of the plan are detailed in a brochure entitled "TCA- Régime de services juridiques".⁹⁴ The plan provides for a number of services that are totally free of charge to the beneficiary. Other services are also free of charge up to a maximum number of billing hours while some others (such as the payment of fines, costs associated with title searches and surveys) are not covered at all.

What we are suggesting is that the Department of Justice and other institutions such as the Québec Bar make the members of the public more aware about the availability of such plans. By spreading more information on this approach, such plans could become sought after throughout the province.

4- Reform of civil and administrative tribunals

The previous pages have underlined how the complex structure of judicial and administrative tribunals tend to prevent easy access to justice for citizens because of the variety of unforeseen barriers, inherent to these institutions.

At the time of preparing this paper, it came to us that the Québec Minister of Justice, the Honorable Herbert Marx, had just tabled before the National Assembly a very much awaited Bill aimed at reforming judicial tribunals presided by provincially appointed judges, i.e. all provincial courts except the Québec Court of Appeal and the Québec Superior Court (presided by federally appointed judges in accordance with Section 96 of the Constitution Act, 1867). However we have not yet received a copy of the Bill and so we present the highlights of the proposed reforms based on information gathered in the media.

The bill was prepared in response to proposals aimed at simplifying the judicial structure in Québec. The proposals were put forward nearly 15 years ago by the Honorable Jérôme Choquette in the White Book on justice administration.⁹⁵ If the bill becomes law, which according to the Minister of Justice should take place in the present year, the Provincial Court, the Youth Court and The Court of Sessions of the Peace will be abolished and replaced by a single court, the "Unified Court", comprising a Civil Division, a Criminal Division and a Youth Division. Judges of the Unified Court would have jurisdiction over the whole province of Québec while retaining the possibility of sitting in either Division, depending on circumstances.⁹⁶

It might be argued that a reform of the court structure alone is not likely to remedy the problem of access to justice. We think quite the opposite. A simplification of the court structure is very likely to improve the public's perception of courts and withdraw some of the "psychological" barriers hindering access to justice. In fact, a citizen's perception of judicial administration can be just as important as the issue of costs.

The reforms proposed by the Minister of

Justice do not address the highly complex structure of administrative tribunals for the simple reason that civil courts reform is the first step taken as part of a thorough review of judicial organization. In fact, the Minister should announce at some time in the future initiatives aimed at reforming administrative tribunals as well.⁹⁷

A possible reason for this two prong approach is that the Minister of Justice is more than likely studying the recommendations of the Task Force on administrative tribunals submitted a year ago and referred to a number of times in this paper. In order to simplify the structure of administrative tribunals, so abhorrent for citizens, in a way that would make them more accessible, the Task Force is proposing among other things an amalgamation of the majority of these institutions into four major ones: the Social Affairs Tribunal; the Real Property Affairs Tribunal; the Administrative Affairs Tribunal and the Housing Tribunal.⁹⁸ Also included in the recommendations is the promulgation of blue-print legislation on administrative tribunals akin to the Statutory Powers Procedure Act in effect in the Province of Ontario,⁹⁹ setting out the basic procedures to be applied by those tribunals.¹⁰⁰ This would help remedy the negative impact on access to justice caused by the multifarious procedures applied by various administrative tribunals

and creating confusion among court users and even sometimes lawyers.

But since it is necessary for a citizen to know where his remedy lies, perhaps provision should be made, where overlapping authority by reason of the subject matter give rise to endless legal quibbling over procedure against the litigant's best interest, to refer the matter to a judge of the Superior Court of Québec who will then finally determine which tribunal has jurisdiction to hear the case. To avoid possible abuse of the proposed procedure, the judge could order an applicant to pay the costs of any frivolous application brought in this context. On the other hand, where a matter is referred by the judge to the appropriate tribunal after having found that a genuine issue of jurisdiction existed, no sanction would apply. The availability of the decision-making power of the Superior Court judge in such cases is also another way of facilitating access to justice.¹⁰¹

5- Increasing access to appeal tribunals

The quality of justice is directly tied to the possibility of reasonably exercising a right of appeal that is as inexpensive as possible and clearly delineated.

Introduction

"No resources of talent and training in our own society, even including medical care, are more wastefully or unfairly distributed than legal skills. Ninety per cent of our lawyers serve ten per cent of our people. We are over-lawyered and under-represented."¹

This comment, made in the context of the American legal system, aptly characterizes the frustrations of many Canadians (including both lawyers and litigants) with our system for resolving legal disputes as well. Partly in response to such accusations, lawyers and governments have continually expressed interest in renewed efforts to promote better access to justice. In Ontario, for example, access to justice goals have recently resulted in pre-trials in family law matters,² renovated court facilities which are accessible to the handicapped,³ court proceedings conducted in the French language,⁴ and legal aid services available from store-front clinics across Ontario.⁵ All of these measures along with others help to ensure that more people have more effective opportunities to participate in the formal resolution of civil disputes.

Yet, the range of measures used to promote access to justice itself creates some difficulty in providing an

overview of the legal scholarship on such access issues. Where access to justice goals are relied on to support measures which improve the efficiency of existing court processes for existing groups of litigants, the emphasis is on procedural changes and the achievement of defined objectives is usually quantitatively measurable. By contrast, where access to justice goals are used to promote measures which encourage new groups of litigants to use courts and other tribunals more often or more effectively, the emphasis is on substantive justice and qualitative changes which may be much more difficult to assess.⁶ Even more significantly, if the emphasis on access to justice measures is focused on ideas of "justice" rather than merely "access", it may include measures which encourage substantive legal changes both in judicial decision-making and through the law-making process of legislatures. If all of these kinds of measures are included in an overview of access to justice scholarship, moreover, the task is a daunting one indeed.

In attempting such an assessment, the approach of this paper includes a twofold analysis. In Part I there is a brief exploration of the meaning of "access to justice" and an attempt to create a framework for analysis of the issues and assessment of the access to justice literature. In this Part of the paper, there are references to both

Canadian and international legal scholarship. Part II of the paper is a bibliographic essay on some of the academic legal literature in the past decade in Canada on issues of access to justice. Because some of this literature may not be well-known, Appendix I is an annotated bibliography of selected articles which appeared in the Index to Canadian Legal Periodicals during the past decade, and Appendix II is a more detailed listing of some relevant academic scholarship indexed in the same source. Although the issue of whether Canadians are "over-lawyered" and "under-represented" is inevitably an empirical one, this analysis of ideas about access to justice in the legal scholarship of the past decade may at least help to frame the questions more effectively.

Part I : Access to Justice :
an Analytical Framework

"The access to justice perspective is an enriching method of analyzing the problems of the modern welfare state. The issues are difficult and the methods of analysis are still in their infancy. The challenge needs to be grasped or the drift towards anarchy will grow perceptibly stronger."⁷

This statement by Geoffrey Palmer, a well-known legal educator, law reformer, practicing lawyer and New Zealand Parliamentarian neatly captures the broad scope of the modern idea of access to justice. As is evident, Palmer regards the access to justice perspective as a means to an end, a way of analyzing the problems of the modern welfare state, and not simply an end in itself. This insight is an important one, clearly suggesting the existence of underlying values which determine both what choices are available and what factors are decisive in resolving issues concerning access to justice. On this basis, of course, the meaning of access to justice can reflect a wide range of different value choices and objectives in relation to a great diversity of issues and activities. In such a context, moreover, the attractiveness of any particular

suggestions for reform are likely to depend more on underlying values than on neutral cost-benefit assessments.

In thinking about choices which must be made, therefore, the analytical framework which follows may be of some help.

1. Access to Justice as Efficiency for Existing Litigants

The need for reform to improve efficiency in the administration of justice has been enthusiastically endorsed by many proponents in Canada in recent years. In British Columbia, a former President of the Canadian Bar Association told the Hughes Committee recently that "the trappings and the formalities of the court system ... have crippled the simplicity of dispute resolution mechanisms and [have] probably put the system financially out of reach for the average Canadian."⁸ In a similar way in Ontario, Attorney-General Ian Scott has suggested that Dickens' biting description of the English Chancery Court of the 1850's in Bleak House is still apt today in terms of "the slowness, the complexity, [and] the expense of the law."⁹ In his view, lawyers need to :

"... look at our system as an ordinary Canadian sees it. Listen to someone

caught in the maze of litigation. Talk to anyone for whom the anguish of marriage breakdown is compounded by the anguish of the legal process. Read some of the letters that outraged clients write to me or to the Law Society."¹⁰

The emphasis in these statements on barriers for litigants created by financial costs and excessive delay is representative of the focus of many reform proposals with access to justice goals. Such proposals recommend measures for increasing the efficiency of the court process and for achieving responsiveness to consumer needs for adjudication that is speedy and simple, and capable of being understood by litigants.

Measures to increase the efficiency and responsiveness of court processes have frequently been recommended and assessed by both scholars and governmental task forces. In relation to the problem of delay, for example, one scholar recommended a number of measures to achieve greater efficiency in the courts, "including effective case flow management, strict controls on court calendar, effective use of judge time, and use of modern technologies."¹¹ As well, the author reviewed measures to reduce the demand on court resources such as alternate dispute resolution processes (small claims courts, arbitration, mediation and conciliation, and citizen dispute settlement centres) and substantive law reform removing

certain kinds of cases from the courts (no-fault automobile insurance, no-fault divorce, and non-judicial name changes and adoptions). The author also assessed the use of judicial impact statements for all legislation as one means of determining the additional need for court resources to meet increasing demands. All of these measures would, of course, produce greater efficiency in the court process, although the impact of each, either alone or in concert with others, requires further assessment.

In reviewing the efficacy of these apparently "objective" measures, however, the author warned of the need to take account of other values in the administration of justice in addition to efficiency: "accessibility of the courts, quality of the adjudicative process, judicial independence, and public confidence in the judicial process",¹² and the fact that "the choice of remedies for curing court congestion and delay is strongly influenced by the value approach of the law reformer, administrator or law maker who has to make the choice."¹³ This comment reinforces the idea that access to justice, seen as greater efficiency in court processes, is not a value-free goal nor one that can be assessed without taking account of other goals of the justice system.

More recently, an Ontario Task Force has also addressed the issues of access to justice specifically focusing on the efficiency of court processes. The Report of the Ontario Courts Inquiry (the Zuber Report)¹⁴ defined the inefficiency in the administration of Ontario courts as "the most obvious and pressing problem". In support of this conclusion, the Report identified the lack of integration in the administrative structure of courts, difficulties in the movement of paper between courts, problems in the allocation of work among court personnel, and lack of flexibility in the use of court rooms as problems to be rectified in making the courts more efficient.¹⁵ The Report also articulated serious problems of accessibility :

"The public's perception that the courts are only for lawyers extends to public access to the courts. There are many types of access to the courts, including physical access, economic access and intellectual access, but one of the most important forms of access is geographical. Many areas in the province feel that they are not adequately served by the courts."¹⁶

Moreover, the Report sharply criticized court personnel for their lack of respect for the public in criminal cases - and some of these comments might apply equally well to civil matters :

"Not only is nothing explained, but lawyers and judges arrive late, matters are adjourned without witnesses being given any advance notice, witnesses wait

all day, only to be told that their evidence is no longer necessary or that they must come back another day. In court, lawyers and judges speak in such a fashion that they cannot be heard by the people seated in the main body of the courtroom, or, when they are heard, they speak an incomprehensible legal jargon, leaving even the accused puzzling over the disposition of his case."¹⁷

In the general principles adopted as the basis for recommendations, the Report specifically addressed the need for accessibility (physical, geographic, intellectual, and economic), the importance of timeliness, and the requirement that courts be as efficient as possible. Significantly, however, this Report also clearly recognized the need to temper efficiency in order to achieve accessibility, and the interrelationship of competing values in achieving a number of different objectives :

"The goal of justice is to do justice, and no reform which would impede this goal would be acceptable. In order to reach the goal of delivering justice, the system must necessarily contain some inefficiencies. Witnesses do become ill or are unavailable at the last minute ... The length of the trial cannot be predicted with accuracy... . However, even allowing for some lack of inefficiency, any reform of the administration must lead to its being, and appearing to be, as industrious and hard working as possible."¹⁸

The recognition in the Report that choices among competing values are necessary, and that such choices are constrained by the interrelationships among these competing objectives

are very significant contributions to ongoing discussions within the access to justice debate.

At the same time, however, the Report appears to support measures to increase the efficiency and accessibility of courts for (at least mainly) existing litigants. The Report's recommendations assume the need for a system of courts to deal with (at least mainly) those disputes which have traditionally been resolved by court processes, and the need to accommodate (at least mainly) those litigants who have traditionally used the courts to resolve disputes.¹⁹ In this notion of access to justice, efficiency for existing litigants includes a wide range of "administrative" reforms, and issues of process such as hours of business, geographic dispersal, and comprehensibility. Taken together with the alternatives to procedural and substantive decision-making by courts and increased court resources, such reforms would undoubtedly have a significant impact on citizens' access to justice.

Yet, it is also evident that none of these recommendations looks beyond court processes to define access to justice in non-litigious legal settings or even in the context of administrative decision-making and tribunals, arguably the most significant forum of decision-making in the modern welfare state. Moreover, a notion of access to

justice in terms of efficiency fails to take account of the legal needs of those who have not traditionally been litigants before the courts. If these latter ideas of access to justice are adopted, additional reforms - beyond the increase in efficiency for existing litigants - will be required.

2. Access to Justice for New Litigants in New Settings

The traditional idea of access to justice has changed tremendously over the past two decades, both in Canada and in other western nations, partly as a result of increasing recognition of the limits of liberalism in achieving equality in a number of different spheres including the delivery of legal services.²⁰ Increasingly, lawyers and others have recognized the need to take account of new needs for legal assistance and representation created by new legislative schemes and legal rights, and to do so through affirmative measures which will result in effective equality for litigants. Basically such measures recognize a need to make equal access to justice effectively available as well as formally mandated. This change from nineteenth century liberal ideas of formal equality to late twentieth century notions of effective equality has been well

documented. In one commentator's view, in the nineteenth century:

"... the equality sought was formal rather than actual: it was enough that all citizens had a legal path open to them by which they could receive a lawyer. This formalism was fully consistent with the manner in which 'all citizens' were equally free to enjoy the political rights that the era valued so highly. These rights were 'preserved' when those who were able to enjoy them were allowed to do so, regardless of how many people could actually take advantage of them."²¹

The creation of provincial legal aid schemes in all provinces in Canada over the past two decades occurred, for example, as a result of a recognition of the need to take affirmative steps to create accessible legal services, thus expanding the equality idea well beyond that of nineteenth century formal equality.²²

Efforts have been directed at more accessible law as well as greater access to justice. In the former context, there has been some recognition of the increasing complexity of the law and of legal processes, and significant efforts directed to making law more easily understood. In 1975, for example, the Law Reform Commission of Canada published its study Access to the Law²³ which tried to assess the ways in which citizens obtained information about the law and legal rights, and made

recommendations for making the law itself more accessible. The opening words of the study echo the comments of Palmer about the role of law in the modern welfare state:

"The state has an obligation to ensure that its laws are available in an understandable fashion to laymen.... [V]ery little attention has been given to accomplishing this objective in Canada - or, indeed, in any common-law country.... Over the past decade, much has been accomplished through our legal aid schemes to make the courts accessible; in the future, emphasis should also be placed on making the law accessible."²⁴

The LRC study concluded that improvements were needed to ensure that those seeking general legal information received accurate and timely information and suggested four methods to achieve this objective: "improvement of existing legal materials, basic education of the public about law, improvement of the quality of legal information dispensed by intermediary organizations, and development of a new source of law for non-lawyers."²⁵ The advent of sophisticated networks for dispensing legal information to the public, such as those developed by the Canadian Law Information Council and other similar organizations, is in part a response to the increased impact of law and legal processes in the ordinary lives of citizens in the post-war western state.

In the context of access to justice, moreover, our ideas have been greatly influenced by the work of several scholars involved in the four-year comparative research project called the "Florence Access-to-Justice Project".²⁶ In writing about the project, the problem of defining the idea of access to justice was carefully considered:

"The words "access to justice" are admittedly not easily defined, but they serve to focus on two basic purposes of the legal system - the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. First, the system must be equally accessible to all; second, it must lead to results that are individually and socially just.... [A] basic premise [is] that social justice, as sought by our modern societies, presupposes effective access."²⁷ (Emphasis in original).

In considering the ideas of justice, access and effectiveness, Cappelletti and Garth also assessed the barriers to participation in the legal dispute resolution process. Like other critics, they concluded that the barriers are most pronounced for small claims and isolated individuals, "especially the poor"; while the advantages belonged to "organizational litigants adept at using the legal system to advance their own interests."²⁸ In confronting these problems, they identified three approaches among modern societies: the "first wave" of the movement was legal aid; the second was the group of reforms aimed at

providing legal representation for "diffuse" interests, especially in the areas of consumer and environmental protection. The third and most recent approach was labelled by the authors the "access-to-justice approach" because of its efforts to attack barriers more articulately and comprehensively.

The authors' critique of these three approaches provides a helpful starting point for the analysis of the issues involved in meeting new legal needs for new litigants. For example, they are critical of the legal aid approach because its effectiveness requires a very large number of lawyers who must be educated and, even more significantly, funded by the state to provide services for those who are unable to pay for services themselves.

"In view of the high cost of lawyers, it is not surprising that to date very few societies have even tried to meet the goal of providing an adequate attorney to anyone for whom the cost is too heavy an economic burden to bear."²⁹ (Emphasis in original).

The authors are also critical of the legal aid approach because it fails to respond adequately to the need for legal services for small claims for individuals (because such cases are simply "uneconomic") and at the same time fails to

respond at all to the need for the representation of diverse group interests.

The second approach of providing for the representation of groups and diffuse interests other than those of the poor is a means of beginning to address the fundamental limits of the adversary approach.

"The traditional conception of civil procedure left no room for the private, non-governmental protection of diffuse interests. Litigation was seen as merely a two-party affair, aimed at settling a controversy between the parties about their own individual rights. Rights tending to belong to a group, to the public or to a segment of the public did not fit well into that scheme. The laws of standing, the rules of procedure, and the roles of the judges were simply not designed to facilitate private enforcement of the rights of diffuse interests."³⁰

The authors catalogue a number of efforts (such as the New Jersey Department of the Public Advocate) to promote the involvement of groups in legal actions, and to foster the creation of interest groups. Changes to the rules of standing and the existence of public interest law firms can permit advocacy on behalf of such interests. However, interests which require effective group action depend on the existence of groups and the possibility of organizing them for the purpose of litigation, and frustrations with these

limits have produced the third wave, the "access-to-justice" approach.

The "access-to-justice" approach outlined by Capelletti and Garth does not abandon the techniques of the first two waves of reform, but treats those reforms as only several of a number of possibilities for improving access:

"This "third wave" of reform includes but goes beyond advocacy, whether inside or outside of the courts, and whether through governmental or private advocates. Its focus is on the full panoply of institutions and devices, personnel and procedures, used to process, and even prevent, disputes in modern societies."³¹

This approach is more comprehensive in terms of reform proposals than those of the first two because this approach recognizes the need to address issues of access to justice beyond the issue of adequate legal representation. It encourages the exploration of a wide variety of reforms, "including changes in forms of procedure, changes in the structure of courts or the creation of new courts, the use of lay persons and paraprofessionals both on the bench and in the bar, modifications in the substantive law designed to avoid disputes or to facilitate their resolution, and the use of private or informal dispute resolution mechanisms".³² It also recognizes the need to relate and adapt the civil process to the type of dispute, having regard to the amount

at issue, the parties involved in the dispute, and the consequences for both the individual litigants and society.

In this context, the reform process represents a comprehensive reexamination of the process of civil justice, not just in relation to improving the efficiency of existing procedures for existing litigants, but also in relation to the emerging needs for new procedures to respond to new kinds of claims on behalf of new litigants. Moreover, Capelletti and Garth recognize the interrelationship of reform proposals relating to civil justice. For example, they suggest that :

"A change in the law that gives tenants more rights, for example, may initially have little or no practical effect, but a subsequent change in the method of delivery of legal services might then alert tenants about their new rights and even lead to a burden on courts not accustomed to contested landlord-tenant litigation. The creation of a landlord-tenant tribunal might then ease that burden on the regular courts, and, if designed to obviate the need for lawyers, might reduce the need for legal services...."³³

This interrelationship of changes in the delivery of legal services was documented in Ontario in a 1987 report prepared for the Law Society of Upper Canada.³⁴ A significant number of critical changes in the organization of lawyers' work arrangements were identified: the role of

prepaid legal service plans, the operation of unsupervised paralegals, the increasing use of corporate in-house counsel; the adoption of franchising techniques for law practices, the development of interprovincial, international and multi-location law firms, and the availability of techniques of alternative dispute resolution.³⁵

On one level, these developments might appear to be isolated and individual responses to particular problems of accessibility to legal services; at the same time, however, they may all be related to the changing needs of consumers of legal services for different types of services and service structures. Looked at globally, there appears to be a trend for large firms to increase in size, becoming in the process ever more inaccessible to the needs of individuals, as opposed to organizational, clients, and for individuals increasingly to turn to other means of resolving disputes (mediation, for example), as well as to other service providers (including paralegals) or other structures (such as franchises). In this respect, the interrelationship of all these different types of reforms is clearly evident.

Even more significantly, these changes in the work patterns of lawyers need to be assessed in terms of the overall organization of the legal system for the

representation of claims in dispute resolution. For some critics of legal services, all of these changes merely evidence the continuing emphasis of law and legal processes on matters of property:

"With the rise of the corporation, and the concentration of capital, much of the practice of law must of necessity be directed to the legal ordering of large scale organization. These transformations of property and legal practice suggest a critical question...: Perhaps the lack of legal services for the poor is only a part of a much more general phenomenon. Has our legal system, by concentrating on the complex needs of our systems of property and large scale organization, given short shrift to the legal needs of all persons - poor or prosperous - in their roles as individual members of the public?"³⁶

In considering this question, moreover, Mayhew suggested the need to examine research indicating the "conservative features of the passively created caseload", including studies demonstrating that the vast bulk of cases brought to legal aid offices were far removed from the "cutting edge of poverty law" and that participants in a union-organized prepaid legal services plan used the service primarily to resolve questions of property rights.³⁷ Thus, Mayhew argued that an access to justice approach needs to take account of "the institutional organization of the legal system, not merely the inability of those who think they want lawyers to pay for them".³⁸

In their survey of trends in the "access-to-justice" approach, Cappelletti and Garth concluded that modern societies were responding effectively to the newly-defined needs for access in the legal process. At the same time, they warned of the need to recognize that improvements in accessibility to the justice system are not substitutes for political and social justice reforms, especially for poor and disadvantaged groups in society. As well, they characterized as "the greatest danger" the risk that the interest in streamlined, efficient procedures might lead to a trend to abandon "the fundamental guarantees of civil procedure - essentially, those of an impartial adjudicator and of the parties' right to be heard."³⁹

"In this study, we have spoken of a change in the hierarchy of values in civil procedure - of a shift toward the value of accessibility. A change toward a more "social" meaning of justice must not mean, however, that the core values of traditional procedural justice are to be sacrificed."⁴⁰

These warning comments underline again the political values inherent in choices about procedures to improve access to justice, particularly in relation to the extension of legal services to new litigants in new settings. Moreover, the comments clearly underline the relationship between access to justice in terms of increased efficiency and access to justice as a broader concept of extending access rights to new groups.

For Capelletti and Garth, access-to-justice reforms should accomplish more than cosmetic changes in procedures by producing concrete and "beneficial changes in the day-to-day lives of the groups for whom the rights were created".⁴¹ In this respect, they suggest that "a real understanding of access to justice ... cannot avoid some political perspective [because] access to justice implicates issues central to the politics of the modern welfare state."⁴² By recognizing the political choices required in the design of any access to justice approach for the modern welfare state, the authors thus reinforce the idea that underlying value choices must be made in designing legal processes appropriate to dispute resolution in the twentieth century.

3. Access to Justice as a Justice Issue

In addition to the idea of access to justice as increased efficiency, and access to justice as the extension of new opportunities for new litigants, a third conception of access to justice has recently emerged. In this conception of access to justice, the emphasis is on substantive rather than merely procedural justice, that is, access to justice as an issue about justice. The focus on "justice" in this conception of access to justice is not

without controversy. At issue is the difficult problem of separating process and substance.⁴³ At this stage, moreover, there are dramatically different views about such a conception of access to justice.

On one hand, some commentators have eschewed completely the notion that legal process can provide any substantive "justice" because "the basic architecture of the legal system creates and limits the possibilities of using the system as a means of redistributive (that is, systemically equalizing) change."⁴⁴ In a probing analysis of the advantages of "repeat players", by comparison with "one-shotters", in the litigation process, for example, Galanter has demonstrated the inherent bias of the legal process toward "repeat players". As well, he has suggested that lawyers who represent "repeat players" are different from those who tend to represent "one shotters":

"[One shotter lawyers] tend to make up the 'lower echelons' of the legal profession. Compared to the lawyers who provide services to ["repeat players"], lawyers in these specialties tend to be drawn from lower socio-economic origins, to have attended local, proprietary or part-time law schools, to practice alone rather than in large firms, and to possess low prestige within the profession."⁴⁵

Lawyers representing "one shotters" are disadvantaged by rules preventing advertising and solicitation, as well as

ethical rules which discourage optimizing strategies; while lawyers for "repeat players" may be able to "trade off some cases for gains on others", the lawyer for "one shotters" is not permitted to use clients as if they together constituted a "repeat player". Thus, procedural rules serve to mask the inequities of the justice system even as they regulate its process, carefully reflecting and reproducing the existing disparities of power while appearing to provide neutral decisions. In this guise,

"... [the legal system] provides a way of accommodating cultural heterogeneity and social diversity while propounding universalism and unity; of accommodating vast concentrations of private power while upholding the supremacy of public authority; of accommodating inequality in fact while establishing equality at law; of facilitating action by great collective combines while celebrating individualism."⁴⁶

This pessimistic conclusion is echoed in the work of other commentators as well, particularly emphasizing the divergence of "civil justice" and "social justice".⁴⁷

Galanter's observations seem to be confirmed by the data assembled for a 1979 study of the participation of women in disputes in civil courts.⁴⁸ The authors of the study concluded that women participated in civil disputes less frequently, by comparison with men, because women

experience less status and wealth which would foster such participation:

"... the frequency with which women are found in civil ... cases across the nation is possibly an indicator of their less than full participation, as a class of persons in mainstream activities in this society. This under-participation in social affairs is a product of culture (the accretion of habits, ways of doing things, socialization, and notions of what behaviour is appropriate for men and women, etc.), and of law (the in built bias in favour of men being major property holders and manipulators). This latter law-produced distortion becomes evident in the non-exercise, by women as a class, of those economic rights which lead through their exercise to participation in legal actions as a "cost" of entrepreneurial activity.⁴⁹

In contrast to Galanter's negative appraisals of the scope for substantive justice within an access to justice framework, and the emphasis on "procedural" access for women on the Statistics Canada report, some recent literature emphasizes the need to accommodate substantive notions of justice for women in the legal process. In the context of women's claims to equality in Charter litigation, for example, it has been suggested that access to justice for women requires a redefinition of the notion of neutrality and objectivity in the adversary process.⁵⁰ In this context, it has been suggested that the Charter has created "the opportune moment to stress litigation as a vehicle for social change".⁵¹

"The challenge is to make the application of [the equality guarantees] meaningful Accepting the challenge will necessitate a change in the way Canadian women approach law reform because the role of courts has been enhanced by the Charter. Litigation, more than ever, has been opened up as a strategy to achieve equality."⁵²

In this respect, access to justice for women requires recognition of substantive ideas of justice, in addition to procedural rights to participate.

This concept, outlined in relation to substantive justice for women participants in the legal system, has also been claimed by other groups who have not traditionally participated (or who have not fully participated) in the legal process, including Indians and native peoples⁵³, visible minorities, disabled people, homosexuals, and economically-disadvantaged people.⁵⁴ To the extent that measures ensure justice to such individuals and groups, the idea of access to justice is substantive; by contrast, if justice is not available to these individuals and groups, the notion of access to justice may be merely a hollow guarantee. In this context, moreover, the concept of access to justice extends to both the creation of legislative rights and their interpretation within the judicial process in courts or tribunals. In this way, it is only if access

to justice means a commitment to the substance of claims litigated by all parties that the idea of access to justice will be one that provides for genuine accessibility.

Access to Justice and the Modern Welfare State

In the context of this analytical framework for considering ideas about access to justice, it is evident that the idea of access to justice connotes no precise meaning. Rather, the idea of access to justice is one which may mean a number of different objectives. As is evident, the three general approaches to access to justice ideas outlined above identify the existence of inherent values in differing conceptions of access to justice, and the nature of political choices about the nature and diversity of interests to be recognized.

Also evident is the nature of the relationship between differing conceptions about access to justice: the possibility that changes adopted to achieve "efficiency as access to justice" may themselves impede or curtail the recognition of claims to "access to justice as a justice issue". Thus, no single reform can be addressed in isolation from others, and each reform must be assessed in terms of its impact on other conceptions of access to

justice. In this way, assigning meaning to "access to justice" inevitably requires choices about both procedural objectives and also about issues concerning substantive participation in the process of decision-making in the modern welfare state. In such a context, no choice is politically neutral or value-free.

Part II : Access to Justice :
A Bibliographic Essay on Canadian Legal Scholarship

"... information about the functioning of civil justice may be ordered from at least two major perspectives: that of participants in the system, and that of social-scientific observers. Each approach is distinctive and produces a unique view of the system"55

The suggestion in this quotation that there are two mutually separate perspectives on civil justice : those of participants in the system on the one hand and those of social-scientific observers on the other - seems at first glance unremarkable. Yet, in relation to access to justice issues, the existence of mutually-separate categories of "participant" and "observer" is complicated by the professional roles performed by lawyers and judges - are they "participants" or "observers"? do their roles change from one to the other, or remain constant? what is the perspective of the "participant who is also observer"? Particularly when the task at hand is defined as an overview of "academic" legal literature on access to justice, it seems important to locate lawyers (and law academics) as

either participants or observers, or both, especially if "each approach ... produces a unique view of the system".⁵⁶

These issues clearly inform the choices necessary to create a bibliographic essay on Canadian legal scholarship about access to justice. Even more significantly, the bifurcated role of lawyers and law academics - as both participants and observers in delivering legal services - may explain the generally less critical perspective in academic legal literature, by comparison with other literature, on access to justice issues. Only to a limited extent does the academic legal literature about access to justice suggest the need for major or fundamental reforms. Instead, much of the literature focuses on reviewing particular courts or tribunals or on assessing individual legal changes from the perspective of the "participant who is also an observer".

1. A Brief Survey : the Index to Canadian Legal Periodicals 1977-87

This overview began with a survey of literature indexed in the Index to Canadian Legal Periodicals 1977-87.⁵⁷ Significantly, there was no subject heading "access to justice" in the Index. As a result, three other subject headings were reviewed for the ten-year period :

"administration of justice"; "courts" and "public legal service".⁵⁸ Some issues surfaced frequently in the literature. For example, a number of articles focused on the nature of judicial independence⁵⁹ or the process of appointment to the judiciary.⁶⁰ Several articles focused on the structure of courts in Canada, including suggestions for needed reforms as well as assessments of recent changes. These articles focused on all levels of courts, including the Supreme Court of Canada,⁶¹ appeal courts,⁶² superior and district courts⁶³, and provincial courts.⁶⁴ Significantly, there were a large number of articles about family courts - in Ontario,⁶⁵ Manitoba,⁶⁶ and British Columbia.⁶⁷ Similarly, some articles explored specialized roles within the civil justice system, such as the referee in debt cases,⁶⁸ the jury system,⁶⁹ and the operation of a commercial list.⁷⁰

Implicit in these articles was the fundamental need to achieve both fairness and efficiency in the civil justice system. In some articles, moreover, there was explicit recognition of the tension between these objectives, and a wide range of measures was reviewed to better achieve access to justice objectives. A number of articles called for improved efficiency in the court system,⁷¹ with recommendations for pre-trials,⁷² oral judgments,⁷³ and time standards.⁷⁴ In the legal aid context, recommendations for

increasing roles for supervised paralegal workers were also common,⁷⁵ along with other suggestions such as the centralization of legal research.⁷⁶ Assessments of the role and potential for small claims courts also appeared frequently,⁷⁷ along with assessments of the role of legal aid clinics.⁷⁸

A number of articles recommended changes to increase access to justice for new litigants. Issues about standing⁷⁹ and the role of public interest advocacy⁸⁰ were not uncommon, and a number of articles focused explicitly on access for the disabled⁸¹ and advocacy on behalf of psychiatric patients.⁸² There were frequent articles also on alternatives to traditional methods of dispute resolution,⁸³ particularly in relation to non-traditional areas of dispute : the environment,⁸⁴ labour relations,⁸⁵ and workers' compensation.⁸⁶ As well, recommendations for the use of the French language in the courts appeared quite often,⁸⁷ along with recommendations for more effective management of courts.⁸⁸ Some articles also focused on the need for more data about civil justice,⁸⁹ particularly from the perspective of sociology⁹⁰ or other disciplines.⁹¹ The idea of accessibility was also addressed frequently in relation to the issue of televised court proceedings⁹², and the use of other forms of new technology.⁹³ Individual articles also made recommendations addressing specific

problems such as the need for a "science court" to assess and determine expert evidence⁹⁴ and the need for better legal training for bureaucrats to promote better administrative decision-making.⁹⁵

As is evident in this overview, the literature surveyed in the last decade of the Index to Canadian Legal Periodicals represents a diversity of approaches to defining and promoting access to justice. Not surprisingly, much of the literature focuses on the idea of access to justice as an issue of increased efficiency in the court system. However, some of the literature also reflects the idea of access to justice in terms of promoting the participation of new litigants in new settings. By contrast, the idea of access to justice as a justice issue occurs much less frequently in the literature surveyed in the Index. In this context, it is interesting to examine other kinds of access to justice literature and to look at some new developments which suggest directions for fruitful inquiry for the future.

2. New Directions in Access to Justice Literature

In terms of ongoing research about access to justice, three comments are appropriate. First, it is clear

from the survey of literature in the Index that most of the authors whose work is published in Canadian legal periodicals are legally trained, and a large number are practising lawyers or judges. If the perspectives of "participants" and "observers" are as distinct as was suggested earlier, it seems obvious that the approaches of "participants who are also observers" must be similarly distinctive. In the result, the legal literature in Canada reflects one perspective much more than others and undoubtedly reinforces lawyers' notions about access to justice issues among its readers as well.

The appearance in 1986 of the Canadian Journal of Law and Society⁹⁶, however, offers some new direction in legal scholarship in Canada, particularly because its authors are often academics with different training and differing insights. As well, the Journal of Law and Social Policy⁹⁷, which first appeared in 1985, similarly focuses on legal developments beyond the traditional adversary system. Whether and how these new voices will be able to participate in the ongoing access to justice debate is itself a question of access to ideas and decision-making about civil justice in Canada.

Second, much of the important literature in Canada on access to justice issues is not published by journals

indexed in the Index to Canadian Legal Periodicals. While the assumption is that the Index relates to academic legal literature, it is evident that much of this literature is produced in fact by legally-trained persons closely connected to the practice of law. While it is important to take account of literature generated by such "participants who are also observers", it is important also to consider the views of other interested persons, including provincial and federal governmental departments and agencies. Reliance on the Index alone, for example, would exclude several important reports at the federal level⁹⁸ and in the provinces⁹⁹ over the past decade, particularly relating to legal aid.¹⁰⁰ Beyond governmental reports, and law reform commission reports, moreover, are briefs and papers prepared by interested organizations including lawyers' organizations like the Canadian Bar Association and public interest groups such as the National Anti-Poverty Organization.

In this context, the work published since 1981 in the Windsor Yearbook of Access to Justice¹⁰¹ also includes an impressive diversity of authors and approaches on issues of access to justice, which are now routinely included in the periodical Index. The point here is that an overview of academic legal literature, defined by entries in the Index to Canadian Legal Periodicals, may be both over - and under - inclusive. Certainly, not all entries are "academic"

since they are often authored by "participants who are also observers"; and, in addition, there are valuable sources of information, some of which is "academic" which are not so indexed. Any project of future research on access to justice must therefore take account of all of these differing sources and perspectives.

Finally, the overview of literature from the Index shows an emphasis on accessibility rather than on justice. The articles demonstrate a high level of consistency in terms of underlying values and fundamental ideas. Moreover, in addition to the shared background of legal training and practical experience among most of the authors, there is also great similarity among them in terms of sex and race. Few articles included in the Index seem to have been authored by native Canadians or by women, for example, and few direct attention to disadvantaged groups other than the disabled or the poor. In relation to women, the publication of the Canadian Journal of Women and the Law¹⁰² was in fact a response to the need to create a forum for such a perspective within Canadian legal literature,¹⁰³ and some of the publications of the Native Law Centre in Saskatoon have similarly offered native perspectives on justice as well.

Yet, it is not sufficient to focus only on ideas of accessibility in relation to new perspectives. Rather, the

focus must be on justice, and the transformation of the civil justice system to provide substantive access to justice. Such a focus inherently requires a recognition of values and political choices, and inextricably connects the idea of access to justice to the policies of the modern welfare state. In this context, the legal process is not objective, neutral, and value-free and the access to justice debate requires a recognition of the political choices inherent in its different meanings - from "access to justice as efficiency" to "access to justice as new litigants and new settings" to "access to justice as a justice issue". In the political process of the modern welfare state, the issue of whether we are "over-lawyered" or "under-represented" also requires a recognition of perspective - from "participants" to "observers" and including "participants who are also observers". Such a focus, finally, takes seriously John Willis' statement that:

"... law is too important to be left to the lawyers; law is for something".¹⁰⁴

Endnotes

* The technical assistance of Mrs. Hazel Pollack is gratefully acknowledged

1. Remarks attributed to President Jimmy Carter in a speech during his Presidency of the U.S.A.
2. Ian R.G. Baxter, "Family Litigation in Ontario" (1979), 29 U.T.L.J. 199.
3. Judge Rosalie S. Abella, Access to Legal Services by the Disabled (Queen's Printers, Toronto: 1983).
4. Courts of Justice Act, 1984 C. 11, sections 135 and 136. See also W.Y.C. Howland, "Is the Face of Justice Changing?" (1981), 15 Gazette 233 at 238.
5. M.J. Mossman, "Community Legal Clinics in Ontario : A Personal Assessment" (1983), 3 Windsor Yearb. of Access to Justice 375.
6. This analysis benefitted from an address by Professor Carrie Menkle-Meadow on "Alternate Dispute Resolution", Annual Institute of the Canadian Bar Association - Ontario, February 6, 1988.
7. Geoffrey Palmer, "The Growing Irrelevance of the Civil Courts" (1985), 5 Windsor Yearb. of Access to Justice 327 at 351.
8. "Costs Deny Many Canadians Justice, Williams Tells Hearing", The National, March 1988 at 39. Williams continued :
"Because of the demands put upon it, the court system is suffering from a worsening but incurable illness. Its slow pace, high cost

and complexities do not provide a serious problem for the corporations and those who can afford it, but for the average person whose requirements are that his or her dispute be resolved in a timely and inexpensive manner, justice is all too often denied them".

Ibid. According to the National, the special committee chaired by Deputy Attorney-General Ted Hughes will report by June 30, 1988 on four target areas : civil trial procedures, criminal procedure, alternate dispute resolution, and the courts.

9. Hon. Ian Scott, "Working Toward Equal Access to Justice in Ontario", [1985] Advocates' Soc. J. 3.
10. Ibid. Attorney-General Scott stated further that:
 "All the laws in the world are worthless if they can't be enforced. The best courts are useless, if their doors are effectively closed to the ordinary citizen. A legal system that is unable or unwilling to confront the legal needs of all its citizens will end as an esoteric failure Access to justice is thus fundamental, an essential feature of any democratic society that seeks to respect individual rights."
Id., at 4.
11. Simon Shetreet, "Remedies for Court Congestion and Delay : The Models and the Recent Trend" (1979), 17 U.W.O.L.R. 35 at 37. Prof. Shetreet analyzed three models for alleviating congestion in the courts and reducing delay : improvement and reform of administrative and legal aspects of the machinery of justice, reducing the demand for court services (by providing alternative procedures, for example), and measures which increase the capacity of the courts (including personnel, facilities and services). The article is particularly helpful in relation to suggestions about monetary measures for expediting justice and judicial controls over delay.
Id., at 43-51.
12. Id., at 36.

13. Ibid. The policy choices available in judicial administration is also clearly evident in the work of Carl Baar; see, for example, "Patterns and Strategies of Court Administration in Canada and the United States" (1977), 11 Law Soc. Gazette 79, and Perry Millar and Carl Baar, Judicial Administration in Canada (McGill-Queen's U. Press: 1981).
14. Min. of the Attorney General: 1987. This Report refers to a number of matters previously addressed in the report prepared by the Ontario Law Reform Commission, Report on the Administration of Ontario Courts (Min. of the Attorney-General: 1973). The White Paper on Courts Administration (Ontario Min. of the Attorney General : 1976) placed overall responsibility for court administration in the hands of judges.
15. Id., at 57.
16. Id., at 61.
17. Id., at 62. The Report also addressed problems of access to the courts in terms of sitting hours and office hours. See para. 4.15 at 63.
18. Id., at 75. The Report recommended better planning for vacancies in judicial appointments, for example.
19. For example, a brief discussion of economic accessibility appears to accept the view that both the rich (through fees paid) and the poor (through legal aid) have economic accessibility to courts, while the middle class face "prohibitive" costs. Id., at 72.
20. An interesting analysis of the development of the ideas of equality in the context of delivering legal services is found in Cappelletti, Gordley and Johnson, Jr., Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies (Dobbs Ferry: 1975). These ideas were also

explored in M.J. Mossman, "Legal Aid in Canada" (Report for the VIIth International Congress on Procedural Law: 1983) at 17ff. See also F.H. Zemans, "Recent Trends in the Organization of Legal Services" (1985), 11 Queen's L.J. 26.

21. Cappelletti, Gordley and Johnson, Jr., supra fn. 20 at 26-27.

22. These views are expressed very clearly in the recent Discussion Paper prepared by the National Legal Aid Liaison Committee of the Canadian Bar Association:

"The inter-relationship between equal justice and legal assistance has developed out of the pure charity of medieval times, through the nineteenth century's mix of formal equality and charitable delivery, to this century's early notions of individual rights protected by positive law and affirmative state action."

See National Legal Aid Liaison Committee, "Legal Aid Delivery Models: A Discussion Paper" (Canadian Bar Association: 1987) at 117.

23. M. L. Friedland with Peter Jewett and Linda Jewett, Access to the Law (Law Reform Commission of Canada and Methuen Publications: 1975).

24. Id., at 1.

25. Id., at 80 and chapter 5. It is also interesting to note the nature of the consumer surveys about legal needs conducted by this study, particularly those which compared the ability of lawyers and others (including public librarians and police) to answer correctly questions concerning "simple" legal problems. On a question about landlord and tenant law, for example, "information centres ... handled this question just as well as the group of lawyers in private practice". As well, the

information centres handled a general question on criminal law just as well as the lawyers. Id., at 23-25 and Table G.

26. Sponsored by the Ford Foundation and the Italian National Council of Research, the project published a four-volume report on its work: Volume I: Access to Justice: A World Survey; Volume II: Access to Justice: Studies of Promising Institutions; Volume III: Access to Justice: Emerging Perspectives and Issues; and Volume IV: Patterns in Conflict Management: Essays in the Ethnography of Law. For further information, see Cappelletti and Garth, "Access to Justice: the Newest Wave in the Worldwide Movement to Make Rights Effective" (1978), 27 Buffalo L.R. 181.
27. Cappelletti and Garth, supra fn. 26, at 182.
28. Id., at 195.
29. Id., at 208. In this context, it is interesting to examine the decision of the European Court of Human Rights in Airey, a decision which concluded that the applicant was entitled to legal representation provided by the state in her suit for divorce in Ireland because "the possibility to appear in person before the High Court [in Ireland] does not provide the applicant with an effective right of access." Eur. Court H.R., Airey case, judgment of 9 October 1979; Series A No. 32, at 13-14.
30. Supra fn. 26, at 209.
31. Id., at 223.
32. Id., at 225.
33. Id., at 227.
34. Greta Fung with Mary Jane Mossman, "Issues in the Delivery of Legal Services: A Report for the Research and Planning Committee of the Law Society

of Upper Canada" (LSUC: 1987).

35. Ibid.
36. Leon Mayhew, "Institutions of Representation: Civil Justice and the Public" (1975) 9 Law and Society Rev. 401.
37. Id., at 415. The studies cited were Fisher and Ivie (1971) for the legal aid offices and Hallauer (1973) for the prepaid legal services plan.
38. Id., at 426.
39. Cappelletti and Garth, supra fn. 26 at 291.
40. Ibid.
41. M. Cappelletti and B. Garth, "Access to Justice as a Focus of Research" (1981), 1 Windsor Yearb. of Access to Justice ix.
42. Id., at xvi.
43. See, for a different perspective, on this issue Allan Hutchinson, "The Formal and Informal Schemes of the Civil Justice System: A Legal Symbiosis Explored" (1981), 19 Osgoode Hall L.J. 473.
44. Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change", [1974] Law and Soc. Rev. 95.
45. Id., at 116.
46. Id., at 148.

47. See, for example, Geoffrey Hazard, "Social Justice Through Civil Justice" (1969), 36 U. Chicago L.R. 699.
48. C. McKie and P. Reed, Women in the Civil Courts (Statistics Canada : 1979).
49. Id., at 20-21.
50. See, for example, Christine Boyle and Susannah Worth Rowley, "Sexual Assault and Family Violence: Reflections on Bias" in Sheilah Martin and Kathleen Mahoney, eds., Equality and Judicial Neutrality (Carswell: 1987) at 312; and other papers in this collection
51. M. Elizabeth Atcheson, Mary Eberts, Beth Symes, with Jennifer Stoddart, Women and Legal Action (Can. Adv. Council on the Status of Women : 1984).
52. Id., at 163. See also Mary Eberts, "Risks of Equality Litigation" in Martin and Mahoney, eds., supra fn. 50, at 95.
53. See, for example, Louise Mandell, "Native Culture on Trial" in Martin and Mahoney, eds, supra fn. 50, at 358.
54. See, for example, A. Bayefsky and M. Eberts, Equality Rights (Carswell: 1985).
55. C. McKie and P. Reed, Civil Justice in Canada (Part I : A Statistical Study) (Statistic Canada : 1979) at 2.
56. Ibid.
57. Selected literature for this period in the Index has been annotated. See Appendix I.
58. For a full listing, see Appendix II.

59. For example, see :
J.D. Arnup, "Some things I worry About." (1984) 18 Gazette 249;
G. Cowan et al, "The judge and the court administration: comments." [1976] Can. Judiciary 192;
B. Laskin, "Some observations on judicial independence." (1980) 4 Prov. Judges J. 4:17;
J.J. Robinette, "The prospects for justice." [1985] Beyond Orwell 497.
As well, the role of the Judicial Council was explored by Deschenes, "The Canadian Judicial Council." [1979] The Sword 55.
60. V. Bergeron, "La crise de la justice." (1978) 38 R. du B. 536.
61. See :
W. Lederman, "Current proposals for reform of the Supreme Court of Canada." (1979) 57 Can. Bar. Rev. 688;
M.C. Shumiatcher, "The Supreme Court and the oral tradition." (1980) 1 Supreme Court L.R. 479;
J.S. Ziegel, "The Supreme Court of Canada and private law appeals; editorial." (1987) 12 Can. Bus. L.J. 385.
62. See W.G.C. Howland, "Is the appellate court system cost efficient?" [1980] Cost 59.
For an assessment of the Ontario Court, see R.F. Reid, "The Ontario Divisional Court." (1983) 17 Gazette 71; (1983) 43 R. du B. 529; and
I. Scott, "Practical problems in the Ontario divisional court." (1983) 43 R. du B. 559.
63. See :
G. Killeen, "An analysis of Ontario High Court and County Court civil and criminal statistics: 1976/77 - 1978/79." (1980) 16 Rep. Fam L. (2d) 351;
C.D. McKinnon, "A brief proposing the merger of the High Court of Justice with the County and District Courts." (1983) 17 Gazette 108;
H.J. Kirsh and H.B. Radomski, "The removal of county court actions to the Supreme Court of Ontario." (1979) 2 Advocates' Q. 28.

64. See N. Lyon, "Provincial courts and the administration of justice." (1979) 3 Prov. Judges J. 3:3.
65. See N. Weisman, "On Unified family courts." (1985) 42 Rep. Fam. L. (2d) 270.
66. See A.C. Hamilton, "The Family Division of the Court of Queen's Bench; introduction." [1984] Pitblado Lect. pt. 1,1.
67. See J. and L. Waterhouse, "Implementing unified family courts: the British Columbian experience." (1983) 4 Can. J. Fam. L. 153.
68. See C.G. Femia, "The role of the referee of the small claims courts in Ontario." [1985] Debtor L. 613.
69. See R.J. Sommers and S.E. Firestone, "In Defence of the civil jury in personal injury actions." (1987) 7 Advocates' Q. 492.
70. See, G. Turriff, "Some thoughts about a Commerical List for British Columbia." (1979) 37 Advocate 225. See also, J.D. Arnup, "Some things I worry About." (1984) 18 Gazette 249.
71. See, B. Dickson, "The Path to Improving Accessibility of the law in Canada." (1985) 8 Provincial Judges Journal 4:2.
72. See,
G.S. Cowan, "Civil litigation at the trial level."
J. Deschenes, "Congestion of national courts: a world-wide problem; a Canadian perspective." [1979] Les Plateaux 175.
G.D. Watson, "Civil pretrial procedure and expeditious justice." [1979] Exped. Justice 125.
73. See J. Deschenes, "Congestion of national courts: a world-wide problem; a Canadian perspective." [1979] Les Plateaux 175.

74. See S. Shetreet, "Time standards for justice." (1979) 5 Dalhousie L. J. 729.
75. See :
J.E. Donahue and F.A. Knoll, "Survey of community legal workers in Ontario." (1981) 5 Can. Community L.J. 1.;
T.H. Taylor, "Paralegals in Saskatchewan community legal services clinics." (1981) 4 Can. Legal Aid Bul. 73;
F.H. Zemans, "The public sector paralegal in Ontario: community legal worker." (1981) 4 Can. Legal Aid Bul. 130.
76. See,
J.D. Bowlby, "Conference on the cost of justice." (1981) 4 Can. Legal Aid Bul. 30;
A.D. Lazar and P. Lordon, "Legal aid in the age of restraint." (1980) 4 Can. Legal Aid Bulletin 40;
T.J. Melnick et al, "Legal aid today; a report." (1985) 43 Advocate 27;
F.H. Zemans, "Recent trends in the organization of legal services." (1985) 11 Queen's L.J. 26;
P. Rosen, "Legal service delivery - a practitioner's view." (1977) 1 Can. Com. L.J. 18.
E. Lightman and M.J. Mossman, "Salary or fee-for-service in delivering legal aid services: theory and practice in Canada." (1984) 10 Queen's L. J. 109.
77. See:
C.S. Axworthy, "A small claims court for Nova Scotia - role of the lawyer and the judge." (1978) 4 Dalhousie L.J. 311;
G. Dunlop and J. Casey, "Exclusive jurisdiction for small claims court: a study paper and recommendations." (1987) 25 Alberta L. Rev. 278;
R.B. Spevakow, "Small claims for Alberta: some recommendations." (1979) 17 Alberta L. Rev. 244;
M. Zuker, "Small claims courts." (1986) 4 Just Cause 2:15.
78. See :
A. Campbell, "The role of legal aid and legal clinics." [1985] Beyond Orwell 425;
H. Savage, "Ontario's community clinics provide law for the little guy." (1979) 3 Can. Legal Aid. Bul. 685;

F.H. Zemans, "Community legal clinics in Ontario, 1980; a data survey." (1981) 1 Windsor Yearb. Access Justice 230;
 F.H. Zemans, "Legal aid and legal advice in Canada; an overview of the last decade in Quebec, Saskatchewan and Ontario." (1979) 3 Can. Legal Aid. Bul. 155.

79. See :
 D.L. Haskett, "Locus standi and the public interest." (1981) 4 Can.-U.S. L.J. 39.
 P.M. Mercer, "The citizen's right to sue in the public interest: the Roman actio popularis revisited." (1983) 21 U.W.O.L. Rev. 89.
80. See:
 R.J. Gathercole, "The British Columbia Public Interest Advocacy Centre." (1982) 40 Advocate 387;
 J. Swaigen, "Clients v. causes." (1981) 5 Can. Lawyer 3:21;
 M.J. Trebilcock and K. Engelhart, "A tax credit for public interest groups." (1981) 3 Can. Taxation 29.
81. See :
 S. Chester, "Access to legal aid clinics." (1985) 3 Just Cause 2:22;
 "Meeting the needs; legal aid plans and the disabled; report." (1983) 1 Just Cause 3:19.
82. See:
 R. Gordon, "Legal services for mental health patients: some observations on Canadian and Australian developments." (1983) 6 Can. Community L.J. 17;
 A. Himelfarb and A. Lazar, "Legal aid for mental patients." (1983) 1 Just Cause 3:9;
 H.A. Kaiser, "Legal services for the mentally ill; a polemic and a plea." (1986) 35 U.N.B. L.J. 89.
83. See :
 E.D. Bayda, "The process of dispute resolution." [1985] Beyond Orwell 439;
 R.J. Horrocks, "Alternatives to the courts in Canada. (1982) 20 Alberta Law. Rev. 326;
 G.D. Watson, "Decision Making." [1985] Beyond Orwell 467;
 M. Teplitsky and W. Low, "Arbitration - an

alternative." (1983) 4 Advocates' Q. 233.

84. See :
J.S.P. Johnson, "The role of the courts in environmental law." (1983) 25 Criminal L.Q. 304;
B.E. Smith, "Practice and procedures before the environmental Assessment Board." (1982) 3 Advocates' Q. 195;
J. Patterson, "Practice and procedure before the Ontario Environmental Appeal Board." (1982) 3 Advocates' Q. 181.
85. See :
R. MacDowell, "Law and practice before the Ontario Labour Relations Board." (1978) 1 Advocates' Q. 198;
G. Palmer, "The growing irrelevance of the civil courts." (1985) 5 Windsor Ybook Access Justice 327.
86. See, W. Riddell, "Procedures before the Ontario Workmen's Compensation board." (1977) 1 Advocates' Q. 46.
87. See :
J.P. Barry, "The integration of the French and English languages into the justice system in New Brunswick." (1983) 14 Revue Generale de Droite 253;
W.D. Lyon, "Bilingual trials in Ontario." (1981) 5 Prov. Judges J. 24.
88. See :
C. Baar, "Patterns and strategies of court administration in Canada and the United States." (1977) 20 Can. Pub. Admin. 242; (1977) 11 Gazette 79;
G.L. Gall, "Achieving efficient court management." (1979) 3 Prov. Judges J. 3:22.
89. See, R.W. Ianni, "Are lawyers failing to meet the existing demand for legal services?" (1983) 6 Can.-U.S. L.J. 152.
90. See, P. Morris, "Sociological research in legal services." (1978) 2 Can. Legal Aid. Bul. 245.

91. See :
R.C.B. Risk, "Lawyers, courts and the rise of the regulatory state." (1984) 9 Dalhousie L.J. 31;
M.F. Southin, "Reflections on chaos in the courts." (1983) 41 Advocate 641;
A.C. Hutchinson, "The formal and informal schemes of the civil justice system: a legal symbiosis explored." (1981) 19 Osgoode Hall L.J. 473.
92. See:
L.H. Abugov, "Televising court trials in Canada: we stand on guard for a legal apocalypse." (1979) 5 Dalhousie L.J. 694;
J.G. Day, "The case against cameras in the courtroom." (1982) 6 Prov. Judges J. 3:9;
A.W. McKay, "Courts, cameras and fair trials: confrontation or collaboration?" (1985) 8 Prov. Judges J. 4:7;
S.E. Nevas, "The case for cameras in the courtroom." (1982) 6 Prov. Judges J. 3:5;
J.J. Robinette, "The prospects for justice." [1985] Beyond Orwell 497;
S. Shetreet, "The administration of justice: practical problems, value conflicts and changing concepts." (1979) 13 U.B.C. L. Rev. 52.
93. See T. Dunne, "Computers and the court." (1987) 6 Advocates' Soc. J. 5.
94. See, G.J. Zimmerman, "Synergy and the science court: scientific method and the adversarial system in technology assessment." (1980) 38 U. T. Fac. L. Rev. 170.
95. See, P.L. Havemann, "Educational innovation for more human justice." (1978) 2 Can. Community L.J. 35.
96. Published by the University of Calgary Press, Faculty of Social Sciences, Research Unit for Socio-Legal Studies, University of Calgary.
97. Published by the Ontario Association of Legal Clinics, now c/o Ontario Legal Aid Plan.

98. See, for example, supra fn. 48 and fn. 55.
99. Including, for example, Annual Reports of departments, Inquiries and Task Forces.
100. See, for example, evaluation reports commissioned by the federal government in relation to most provincial legal aid schemes in Canada over the past decade.
101. Published by the Faculty of Law, University of Windsor. See also the Cumulative Index of Abstracts of Articles for Volumes I to V (1981-1985).
102. Published by the National Association of Women and the Law, Ottawa. In the first volume, the editors wrote :
"As we embark on the process of claiming equality as a concept that has meaning for women as well as for men, and as we begin the publication of a journal that has as one of its ultimate aims the transformation of the normative tradition itself, we are aware that this project is situated within deep contradictions in the liberal tradition. Women are oppressed by the content of the law as well as by the ideas and conduct of many lawyers, judges, legislators, and law teachers, yet we have chosen to work within the legal process - as other women have chosen to work within other cultural institutions - in the struggle for liberation."
"Editorial" (1985) 1 Can. J. Women and the Law, iv, at x.
103. The issue about the meaning of justice, and the possibility that men and women relate to it quite differently, has been most recently articulated by Carol Gilligan in In a Different Voice (Harvard U. Press: 1982).
104. Professor John Willis, Convocation address, Osgoode Hall Law School of York University, 1973, as quoted in S.M. Waddams, "Research and Scholarship" in R.J. Matas and D.J. McCawley, eds., Legal Education in

Canada (Federation of Law Societies of Canada :
1987) 179, at 179-180.

APPENDIX I
SELECTED ANNOTATIONS

LIST OF ANNOTATED ARTICLES

- L. H. Abugov, "Televising court trials in Canada: we stand on guard for a legal apocalypse." (1979) 5 Dalhousie L. J. 694.
- J. D. Arnup, "Some things I worry About." (1984) 18 Gazette 249.
- C. S. Axworthy, "A small claims court for Nova Scotia - role of the lawyer and the judge." (1978) 4 Dalhousie L. J. 311.
- C. Baar, "Patterns and strategies of court administration in Canada and the United States." (1977) 20 Can. Pub. Admin. 242; (1977) 11 Gazette 79.
- J. P. Barry, "The integration of the French and English languages into the justice system in New Brunswick." (1983) 14 Revue Generale de Droit 253
- E. D. Bayda, "The process of dispute resolution." [1985] Beyond Orwell 439.
- V. Bergeron, "La crise de la justice." (1978) 38 R. du B. 536.
- J. D. Bowlby, "Conference on the cost of justice." (1981) 4 Can. Legal Aid Bul. 30.
- A. Campbell, "The role of legal aid and legal clinics." [1985] Beyond Orwell 425.
- J. B. Chadwick, "Legal aid in the 80's" (1981) 15 Gazette 278.
- S. Chester, "Access to legal aid clinics." (1985) 3 Just Cause 2:22.
- G. Cowan et al, "The judge and the court administration: comments." [1976] Can. Judiciary 192.
- G. S. Cowan, "Civil litigation at the trial level."
- J. G. Day, "The case against cameras in the courtroom." (1982) 6 Prov. Judges J. 3:9.
- J. Deschenes, "The Canadian Judicial Council." [1979] The Sword 55.
- J. Deschenes, "Congestion of national courts: a world-wide problem; a Canadian perspective." [1979] Les Plateaux 175.
- B. Dickson, "The Path to Improving Accessibility of the law in Canada." (1985) 8 Provincial Judges Journal 4:2.
- J. E. Donahue and F. A. Knoll, "Survey of community legal workers in Ontario." (1981) 5 Can. Community L. J. 1.

A. N. Doob, "Turning decisions into non-decisions." [1983] Current Issues 147.

G. Dunlop and J. Casey, "Exclusive jurisdiction for small claims court: a study paper and recommendations." (1987) 25 Alberta L. Rev. 278.

T. Dunne, "Computers and the court." (1987) 6 Advocates' Soc. J. 5.

T. Ehrlich, "Why legal aid? A rationale for legal services for the poor." (1981) 4 Can. Legal Aid Bul. 312.

W. Estey, "Who needs courts?" (1981) 1 Windsor Yearb. Access Justice 263.

Federation des femmes du Quebec, "Jurisdiction in family law." [1981] Women and the Constitution in Canada 119.

C. G. Femia, "The role of the referee of the small claims courts in Ontario." [1985] Debtor L. 613.

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ADMINISTRATION OF JUSTICE 1979

CANADA

L. H. Abugov, "Televising court trials in Canada: we stand on guard for a legal apocalypse." (1979) 5 Dalhousie L. J. 694.

The author deals with the issue of the presence of television cameras in the courtroom. In the United States inroads are being made, and Canada should look to those events. Historically in the U.S., T.V. in court was prevented both by statute and by one of the Canons of Ethics to which the judiciary are subject. However there have been a number of experiments in recent years with T.V. in courtrooms. They have met with mixed success. The landmark U.S. case was the Estes case in which a conviction was overturned on the basis that the accused's case was prejudiced by the disruptive presence of cameras. The argument is that cameras are physically, psychologically and legally disruptive. The author balances the right to privacy and freedom of the press, the right to a public trial and the right of a fair trial. He considers the arguments against cameras, their prejudicial and disruptive effect and rebuts some of those arguments with better technology, filming with consent, the inherent lack of privacy of the accused, and the fact that the prejudice exists because of the presence of the media. It is only a matter of degree. There is an educational value to broadcast of trials. The dignity and fairness of the courtroom may in fact be enhanced by public scrutiny. Guidelines, judicial discretion and improved technology all contribute to the solution.

ADMINISTRATION OF JUSTICE 1984

J. D. Arnup, "Some things I worry About." (1984) 18 Gazette 249.

The author expresses concern over the overcrowding of the Supreme Court of Ontario and its potential effect on quality of justice. He is also concerned about what he terms "advocacy by press conference", about the difficulty for the lay person in finding the appropriate lawyer, the adequacy of legal education, and legal ethics in the criminal field. He recommends a return to good manners in litigation and expresses a confidence in the noble legal profession.

ADMINISTRATION OF JUSTICE 1978

NOVA SCOTIA

C. S. Axworthy, "A small claims court for Nova Scotia - role of the lawyer and the judge." (1978) 4 Dalhousie L. J. 311.

At the time of writing, Nova Scotia did have a Small Claims court. Jurisdiction was given to Municipal court with provincial court judges. Legal Aid has a threshold level which exempts certain minimum sums. It is proposed that a Small Claims Court in Nova Scotia be formed. It should be less formal, with less stringent rules of evidence. The author discusses the problem of the presence of lawyers in Small Claims court. The author submits that lawyers should be barred. Alternatively, free legal assistance should be provided by the court. The judge should not be a judge in the traditional sense and he should be involved in pre-trial procedures and attempts of reconciliation of the parties. It should be his aim to ensure that participants understand what has occurred. The author lists a number of specific goals regarding the role of the judiciary in Small Claims Court. The author recommends that 1. lawyers should be excluded. 2. judges should be more inquisitorial and that 3. a conciliation procedure should be established as a prerequisite to a hearing before Small Claims court.

ADMINISTRATION OF JUSTICE 1977

CANADA

C. Baar, "Patterns and strategies of court administration in Canada and the United States." (1977) 20 Can. Pub. Admin. 242; (1977) 11 Gazette 79.

The author makes an organizational comparison between the patterns of judicial administration in Canada and the United States and concludes that the nations' differing constitutional principles create different consequences. The Canadian system results in 'encapsulation' of judicial power while the American system results in organizational growth. Canada has a system which recognizes parliamentary supremacy while the U.S. has a distinct separation of powers. As a result the systems must function differently and have quite different modes of accountability and creation of power. The author concludes that limits on judicial strategies may be ineffective in any case and that it may be necessary for judges to redefine significant administrative roles.

COURTS 1984

NEW BRUNSWICK

J. P. Barry, "The integration of the French and English languages into the justice system in New Brunswick." (1983) 14 *Revue Generale de Droit* 253.

In 1973 the Official Languages of New Brunswick Act provided that anyone could be heard in court in their own language. In practical terms equality was not achieved. Discretion remained with the judge as to the language of the proceeding. A committee of the New Brunswick Law Society prepared a report and make recommendations to redress the problem. The Premier rejected their recommendation regarding judicial discretion. However, a number of recommendations were subsequently made with regards to procedures and legal documents of common usage. An accused was to elect the language in which he was to be tried. Transcripts were to be made in the language used. A two year plan of implementation was to be in place. There was considerable consternation among some of the uni-lingual lawyers. In the end, the Provincial Government Task Report adopted many of the recommendations of the Bar. The question now, is whether these recommendations will be carried out.

ADMINISTRATION OF JUSTICE - 1986

CANADA

E. D. Bayda, "The process of dispute resolution." [1985] Beyond Orwell 439.

What does society expect the decision making process to accomplish? What are the underlying assumptions, perception of procedure and nature of the procedure? The article presents a discussion of these issues regarding the decision making process. The author considers the tasks of the process in general in dispute resolution. He considers the court as conflict resolver, social controller, lawmaker and government controller and concludes there is room for change. However, we need stronger legislative steps to strengthen the court's independence.

ADMINISTRATION OF JUSTICE 1978

V. Bergeron, "La crise de la justice." (1978) 38 R. du B. 536.

M. Bergeron addresses the issue of the form of justice in Quebec. He poses the question of who and how are judges appointed and the manner in which they carry out their tasks. He discusses the nature of judicial independence, given the separation of the three branches; executive, legislative and judicial. Some of the factors which ensure judicial independence are a fixed salary, immunity, tenure and the nature of review of judicial decisions. In particular, the author discusses the mode of appointment; who may be appointed and the length of their mandate. The author recommends that the Bar take a leading role in trying to find new ways to provide the greatest justice.

ADMINISTRATION OF JUSTICE 1981

CANADA

J. D. Bowlby, "Conference on the cost of justice." (1981) 4 Can. Legal Aid Bul. 30.

The author asserts that the value of justice is not one of monetary cost. He specifically deals with the criminal legal aid system and its low budget. He sets out the existing set up and distribution, the need to get value for government dollars, and the modest improvement in the tariff levels. The creation of a central research facility would avoid redundancy. There is a need to develop paralegal staff, junioring of young lawyers, and the use of duty counsel. The author concludes that the situation is improving but that cost reduction should not be the primary goal of the system. Statistics on expenditures for justice on a percentage and on a per capita basis are included.

PUBLIC LEGAL SERVICE - 1986

CANADA

A. Campbell, "The role of legal aid and legal clinics." [1985] Beyond Orwell 425.

The author focusses on access to law, particularly legal aid clinics. The laws in Canada are complex and many which may result in the denial of legal service access to some. this in turn creates an entrenched inequality and weakens the rule of law. Community legal aid clinics in Ontario are growing and responding to individual communities and needs. The author cites as particular examples the Canadian Environmental Law Association and the Central Toronto Community Legal Clinic. The Report on clinic funding shows that there are still gaps. The author makes the distinction between the delivery of legal services and political activity by clinics. The two must be kept separate.

CANADA

J. B. Chadwick, "Legal aid in the 80's." (1981) 15 Gazette 278.

In British Columbia, there has been experimentation with the public defender system. There is a tension between the salaried public defender and the fee-for-service legal aid worker. The author describes the history of the public defender from 1928. In 1963 it was considered that the public defender would not be appropriate in Canada. The author recommends a consideration of the factors of cost, quality and satisfaction in assessing the success of the public defender system.

S. Chester, "Access to legal aid clinics." (1985) 3 Just Cause 2:22.

Legal aid began by voluntary participation and has evolved into legal aid clinics. Not all of them are physically accessible to the disabled. The article cites 18 recommendations to make them more accessible. Where they are not currently accessible, there are outreach programs to the people at home. Accessibility of the clinics and courts is also essential for disabled lawyers.

ADMINISTRATION OF JUSTICE 1977

G. Cowan et al, "The judge and the court administration: comments." [1976] Can. Judiciary 192.

The author addresses the controversial issue of the respective roles of the judiciary and executive in court administration. A history of the subject shows an ever increasing difficulty with the caseload burden of the courts and the administration of them. Ontario, like other provinces has addressed the problem in reports and studies. Judges have actively participated in the reform of the system. A failure to define the roles of the executive and the judiciary in the administration of the courts has constrained both from developing solutions. The author offers two models of court administration; 1. The U.S. "Third Branch Model" with the judiciary as "separate but subservient". Appointments and funding act as controls; 2. The United Kingdom model based upon a restructuring according to the Beeching Report. In Canada, the Ontario Law Reform Commission recommended that the court administration should primarily be the responsibility of government without adversely affecting the judges' adjudicative processes. The author distinguishes the U.K. and U.S. systems with that of Ontario. In Canada, the author concludes, the executive must convince the judiciary of its bona fide intentions, and the court must take a hard look at what is really meant by "judicial independence". The author recommends increased team work between judges in their attempts to administer the courts properly.

COURTS 1978

NOVA SCOTIA

G. S. Cowan, "Civil litigation at the trial level." (1978) 1 Advocates' Q. 259.

Judges in Nova Scotia are exercising some control over the conduct of litigation according to their Judicature Act, thus reducing delays. There is a time limit by which an action must have been set down for trial, on a fixed date, thus eliminating the back log. Rules dealing with abolishment of a writ of summons and with discovery and disclosure speed the action. Pre-trial conferences simplify proceedings as does a pre-trial brief to the judge. The result has been a reduction in backlog and increase in cases handled.

COURTS 1982

J. G. Day, "The case against cameras in the courtroom." (1982) 6 Prov. Judges J. 3:9.

Some of the problems with the use of cameras in the courtroom include noise and interference, the distortion and fragmentation of the content by editing, the potential for in-court theatrics and the difficulty of getting impartial juries. The author states that the educational requirement of the court procedure is secondary to the finding of truth, and that the public need to know is satisfied by the presence of media representatives in the court and the availability of transcripts. Day concludes that the presence of cameras is deleterious to the participants and the process and may prejudice a case. The policy should be reconsidered. The author offers statistics on the effect of cameras in court.

ADMINISTRATION OF JUSTICE 1979

CANADA

J. Deschenes, "The Canadian Judicial Council." [1979] *The Sword* 55.

The Canadian Judicial Council was created out of a need for greater consultation and collaboration between superior court judges. The Council aimed to improve efficiency, uniformity and quality in the superior courts. A number of permanent committees were set up to deal with such subjects as public relations, judicial conduct, research and educational goals. One committee dealt specifically with the administration of justice and improving its quality. This included courses for newly appointed judges and plans regarding judges' sabbatical leaves. If the council succeeds it will be a powerful instrument for updating and improving the quality of professional services rendered by superior court judges.

ADMINISTRATION OF JUSTICE 1979

CANADA

J. Deschenes. "Congestion of national courts: a world-wide problem; a Canadian perspective." [1979] Les Plateaux 175.

The author summarizes the Canadian Judicial System and the distribution between provincially and federally constituted courts. The article relies on surveys taken of statistics from the Federal Court and several of the provinces. In the situation in matters of bankruptcy, family or criminal issues, the situation seems under control. However, in civil matters the situation is not as satisfactory. A number of factors create this problem including increased consciousness of rights, increased criminality, increased length and complexity of trials, too many lawyers and too few judges appointed, legal aid, and the new Divorce Act. The author makes 7 recommendations including better passage of information, better pre-trial procedures, disclosure, delivery of oral judgements, increased numbers of judges and better management of existing caseloads. The critical issue is maintaining unfettered access to justice.

ADMINISTRATION OF JUSTICE 1985

B. Dickson, "The Path to Improving Accessibility of the law in Canada." (1985) 8 Provincial Judges Journal 4:2.

This paper was presented at the annual meeting of the Canadian Bar Association on August 28, 1984. The author stressed that the purpose of the Bar Association is the advancement of skill relating to law, the shaping of the Canadian identity and national unity. The system must remain responsive and accessible in a bilingual, multicultural Canada. The Charter creates new jurisprudential challenges.

The author recommended that there be practical changes to reduce costs and delay, and improve communication and education of the public. This could perhaps include television in the courtroom. The Supreme Court of Canada must be made more efficient, have increased sitting days, restrict written material submitted, make use of technological innovations such as teleconferencing for leave to appeal and electronic case-flow management. There is a need for increased arbitration and mediation. The author called for the bar to join in the Court's efforts to make the system more efficient.

PUBLIC LEGAL SERVICE 1982

ONTARIO

J, E. Donahue and F. A. Knoll, "Survey of community legal workers in Ontario." (1981) 5 Can. Community L. J. 1.

The authors have done a study of community legal workers in Ontario by means of a questionnaire. Their concern is accessibility of legal services in Ontario through the evolving and increasing role of community legal workers in clinics such as Parkdale. The results of the survey create a profile of the typical worker but confirm that there is a wide range of background education, experience and age among CLW's. Salaries are low and commitment is high. Supervision by lawyers remains a necessary element to their work. However, it is felt that training is a prime issue, something beyond the apprenticeship programs now in place. The authors conclude that the future for community legal workers is promising largely because of the increased recognition of legal rights and the high motivation of the clinic workers.

ADMINISTRATION OF JUSTICE 1984

CANADA

A. N. Doob, "Turning decisions into non-decisions." [1983]
Current Issues 147.

The author deals with the diversion of juveniles from court to an alternative system, and the cautioning of juveniles when they are charged. There is considerable discretion on the part of the police as to whether the individual becomes involved in the judicial system. These involve varying criteria such as previous involvement with the police, The offender's attitude towards the police, parent involvement, victim and school input. The police maintain a specific youth bureau to handle juvenile cases. The author considers the dangers and advantages of the diversion process. The existence of such a program may affect an officer's decision to charge. The diversion program may, in fact, infringe upon the offenders rights and create an atmosphere of coercion. Neither costs nor rates of recidivism are actually reduced. The author is not in support of the system although he recognizes the weaknesses of the current one.

ADMINISTRATION OF JUSTICE 1987

ALBERTA

G. Dunlop and J. Casey, "Exclusive jurisdiction for small claims court: a study paper and recommendations." (1987) 25 Alberta L. Rev. 278.

The article deals with Project Omega in 1978 and the Administration of Small Claims Act. There are problems with concurrent jurisdiction of Small Claims courts and the court of Queen's Bench in Alberta. There are significant differences in the default judgment procedures in the two concurrent courts. Student Legal Services in Edmonton made a study of the problem. The objectives of Small Claims Courts are 1. Simplicity 2. effectiveness 3. accessibility, for both prosecution and defence.

The article canvasses the arguments against concurrent jurisdiction and those in favour. The difficulties raised are those of default judgments, legal costs, complexity of cases and the handling of constitutional issues. The author concludes that concurrent jurisdiction denies the poor access and:

1. Small Claims courts should have exclusive jurisdiction under \$2000.
2. Provincial courts could transfer actions to Queen's Bench where appropriate.
3. The default system should be simplified and added to the Small Claims court procedure.

ADMINISTRATION OF JUSTICE 1987

T. Dunne, "Computers and the court." (1987) 6 Advocates' Soc. J. 5.

Computers have achieved widespread use in the courts and are present in all offices of the Supreme and District courts of Ontario. They create an information system which, however, does not replace the parallel paper system. The systems are used for:

1. Casetracking in civil courts
2. Criminal courts
3. Motion courts
4. Calendaring to eliminate wasted counsel trips.
5. And are available to lawyers at the Sheriff's office.

There are concerns about privacy of information and misuse but they may be balanced by gains in efficiency.

PUBLIC LEGAL SERVICE 1981

T. Ehrlich, "Why legal aid? a rationale for legal services for the poor." (1981) 4 Can. Legal Aid Bul. 312.

Legal problems impact on the poor more seriously than on the majority. The issue is why the federal government should support a legal aid system. The author cites 6 reasons:

1. Legal services ameliorate effects of poverty
2. Hurdles to access should not be insurmountable due to poverty.
3. Substantive rules of law often apply to the poor unfairly.
4. Legal aid helps avoid or settle disputes in the only means the poor may have available.
5. Legal service lawyers are civil law enforcement agents.
6. Access to the legal system is an inherent right of citizenship.

ADMINISTRATION OF JUSTICE 1981

CANADA

W. Estey, "Who needs courts?" (1981) 1 Windsor Yearb. Access Justice 263.

Mr. Justice Estey argues for change and progress within the judicial system rather than stagnation. He surveys the parameters within which the court system must function including the machinery of the courts and the responsive nature of the common law itself. There has been a vast increase not just in volume but in range of issues which come before the courts. Justice Estey advocates a study of the judicial system to determine where and how much the courts system has become out of date. The author concludes that it is necessary to use technological resources available, to better administer the courts internally, to remove issues which should be resolved elsewhere, and to establish court staff training programs in order to maximize use of existing scarce resources without putting further fiscal demands unnecessarily on the taxpayer.

ADMINISTRATION OF JUSTICE 1982

CANADA

Federation des femmes du Quebec, "Jurisdiction in family law."
(1981) Women and the Constitution in Canada 119.

The article reviews the need for a unified body of law dealing with family law. One government, federal or provincial, should hold both legislative and judicial responsibility for this area in each province. The Federation des femmes du Quebec approves of the effort to have the province do the administering since the province is more likely to be in touch with the individual. It is essential to the identity of Quebec that the civil law system be retained.

ADMINISTRATION OF JUSTICE 1985

C. G. Femia, "The role of the referee of the small claims courts in Ontario." [1985] Debtor L. 613.

The author describes the history of the referee. The Small Claims Act of 1977 defined the duties and responsibilities of the referee including conducting pre-trials and judgement summons hearings. The referee does not make the final decision but refers the information to the judge. Currently the referee interviews at debtor hearings, sets up payment programs, does some of the accounting in complex cases, answers the public's questions and handles pre-trial resolution hearings in an effort to get mediated settlements. If these approaches are not successful, the case goes to trial.

ADMINISTRATION OF JUSTICE 1979

CANADA

G. L. Gall, "Achieving efficient court management." (1979) 3
Prov. Judges J. 3:22.

The author addresses the question of what can be done to reduce the length of time involved in the entire litigation process of a dispute. The backlog exists because of increased litigation and because of the intensification of population in urban areas resulting in shortages of space and judges in particular jurisdictions. This results in increased costs to litigants and an altered quality of justice. The solutions are largely administrative ones. Budgetary restraints and the need for judicial administration of the courts have, however, provided obstacles. The author offers a number of suggestions for appropriate components in any revised set up. If judges are to continue as administrators they must be trained as such and specialize. This may not be practical, given their current workload. The author recommends the creation of a new professional courtexecutive to oversee the running of the courts at a managerial level. This courtexecutive would be accountable to the judge and handle administrative tasks. There is a need for a better caseload and calendaring system and computerization. Any solution will involve education of the judiciary.

PUBLIC INTEREST 1982

R. J. Gathercole, "The British Columbia Public Interest Advocacy Centre." (1982) 40 Advocate 387.

The centre was opened in 1982 with a mandate to provide legal representation to public interest groups who would not otherwise obtain it, in matters of general public concern. The centre has specific goals: 1. To provide citizen's groups with access to appropriate decision making bodies. 2. To promote protection of specific interests. 3. To provide access to regulatory authorities. 4. To promote test case litigation and law reform. The centre works with other organizations to avoid overlap. The board is composed of 6 lawyers and 6 non-lawyers.

COSTS 1980

N. Gold, "The courts authority to award costs against lawyers."
[1979] Studies in Civ. Proc. 57.

The author considers the jurisdiction of the court to award costs against a lawyer as well as sources, grounds, scope and examples of use of this authority. The judicial system's framework requires settlement to be the goal. The adversary system may foster disputes and abuse must be minimized. The lawyer controls the conduct of civil cases. Lawyers behave as they do for a number of reasons and it is up to the court to control abuse of their control. The tort system provides for an action for malicious prosecution, malicious use of process and malicious abuse of process. In the past courts have ordered lawyers to pay costs in certain cases such as Myers v. Elman. The distinction is between mistake and misconduct. The lawyer has a duty to the court and to the due administration of justice. Honesty and competence are fundamental. The common and statute law provide for a remedy only for gross misconduct. The author concludes that there should be liability for negligence, errors or misconduct.

PUBLIC LEGAL SERVICE 1984

CANADA

R. Gordon, "Legal services for mental health patients: some observations on Canadian and Australian developments." (1983) 6 Can. Community L. J. 17.

The author parallels the growth of the legal aid system and that of mental health law in the United States, Canada and Australia. There is a concern that the legal aid system may act as a restraint on the growth of patients' rights because of the close ties between the two. Advocacy for patients is often contrary to the established institutional systems. Is there a conflict of interest here? Is there true advocacy? There is a need for financial and ideological autonomy in the patients' rights organization and legal representation. There must be power for the client group in order to achieve the required goals.

PUBLIC LEGAL SERVICE 1982

BRITISH COLUMBIA

G. Goyer and D. Maas, "Evaluation of B.C. legal services." (1982)
40 Advocate 417.

The author requests that B.C. lawyers submit comments and respond to questionnaires on the B.C. legal aid services. The author notes that there is quite a variance from province to province in the mode of services, but that the primary responsibility for legal aid rests with the provinces with additional federal funding. The purpose of the evaluations is to assess the efficiency of the current system.

COURTS 1980

ONTARIO

J. Halfnight, "Third party procedure: some problems of purpose and scope." [1979] Studies Civ. Proc. 87.

The author describes situations in which 3rd party proceedings are appropriate and where such an action creates confusion. The Judicature Act 18.4 allows for a 3rd party proceeding. There are 3 acceptable purposes; ultimate liability purpose where the third party stands in the shoes of the defendant for the main action, common subject purpose where the facts are the same and there is a single transaction, and declaratory purpose to bind the third party in subsequent proceedings. The scope must be limited if the purpose is to resolve all legal disputes arising from a single subject. The author describes the English experience, and the Ontario experience as dictated by the Judicature act. The author concludes that where all the claims are connected by a common set of facts 3rd party proceedings are appropriate for any of the three purposes described above.

COURTS 1985

MANITOBA

A. C. Hamilton, "The Family Division of the Court of Queen's Bench; introduction." [1984] Pitblado Lect. pt. 1, 1.

The Family Division of the court of Queen's Bench in Manitoba was designed to provide a unified family law service. It is being used in a limited part of the province. The goal is to resolve family disputes inexpensively and expeditiously. It is modelled after the Ontario and Saskatchewan experiments and has an attached conciliation service. This comes into play early in the proceedings and often results in settlement. Voluntary agreements between parties are encouraged. Mediation is optional. Procedure has been simplified to reduce the number of additional motions that need to be filed. Pre-trial conferences before a judge also help attain early settlement. The intent is simplification and processing with as little interruption as possible. It is hoped that counsel will avail themselves of the services of this system as that will determine success or failure.

PUBLIC INTEREST 1981

D. L. Haskett, "Locus standi and the public interest." (1981) 4 Can.-U.S. L.J. 39.

The traditional view of standing is that the courts are designed for dispute settlement between parties whose legal interests are at stake. This does not allow for public interest litigation. The traditional approach maintains the truly adversarial nature of dispute settlement and the separation of powers in the field of social reform. The author describes and compares the American experience regarding standing with the Canadian one, and responds to concern about the "floodgates" fear of an inundation of litigation. Congress may confer standing for litigation but tests have evolved which determine eligibility. The author refers to standing for inanimate objects, organizational plaintiffs and the assertion of rights of third parties. The American approach resulted in a view that standing required the party to be "exceptionally prejudiced" and did not provide for standing where all members of the public would be affected alike. The role of the Attorney General in Canada includes representing the public interest. He has absolute discretion. This view derives from the English rule against interference. In Canada there are four exceptions to this rule. In Thorson the Supreme Court of Canada granted standing to an individual and asserted that that is within the court's discretion. There have been subsequent decisions in support of the concept of judicial discretion regarding standing.

ADMINISTRATION OF JUSTICE 1978

P. L. Havemann, "Educational innovation for more human justice."
(1978) 2 Can. Community L. J. 35.

The author describes the "Human Justice Program" in London, designed to educate the bureaucrats who control access to the justice system. The various professions involved for the the same end may have means which conflict. In this program justice to the client is the only controlling force. The article contains a list of references.

PUBLIC LEGAL SERVICE 1985 - CANADA

A. Himelfarb and A. Lazar, "Legal aid for mental patients." (1983) 1 Just Cause 3:9.

Evaluations show that there is a need for legal aid for mental patients especially in light of their loss of fundamental rights and the inherent legal dispute created by involuntary committal. There are issues of treatment and transfer of patients. A legal aid lawyer must be accessible, empathetic and fiercely independent. It is necessary to overcome hospital staff perceptions of intrusion and unnecessary legalism and to overcome client/counsel difficulties. It is recommended that the project continue and become a fixed part of legal aid.

PUBLIC INTEREST 1981

J. E. Hodgetts, "Government responsiveness to the public interest: has the progress been made?" (1981) 24 Can. Pub. Admin. 216.

The author submits that the apparent failure of the government to be responsive to the public interest is the result of their failure to achieve an unrealistic ideal. The author submits that a correct test for responsiveness requires the examination of institutional arrangements which respond to diverse and not to specific interests. There are implications with regards to accountability which act as governing factors.

ADMINISTRATION OF JUSTICE 1982

CANADA

R. L. Horrocks, "Alternatives to the courts in Canada. (1982) 20 Alberta Law Rev. 326.

The author canvasses the alternatives to formal proceedings to settle disputes. He recommends mediation, conciliation and arbitration as being expeditious, low cost and informal. Such a system has always existed. Currently in the criminal justice system there is an effort to divert, to provide alternatives to court remedies and procedures. In civil disputes mediation has become used experimentally in the U.S. and in projects in Canada such as the Windsor-Essex Mediation Centre. Mediation within the court system also exists in small claims courts and family law courts. Arbitration is used in commercial disputes. The author concludes that the active participation of the parties to a dispute makes the resolution more acceptable and that there is merit in such informal alternatives.

COURTS 1981

W. G. Howland, "Is the appellate court system cost efficient?"
[1980] Cost. 59.

There is a tension between the appeal courts role in quality of justice and scrutiny of process to expedite justice. If there is a choice, quality of justice must prevail. Delay and expense may result in a denial of justice. The author compares the Ontario Court of Appeal to that of England and the United States. He compares the use of oral argument and of factums and states that Ontario has a mixed system. The right to appeal differs. In England and Ontario leave is required for criminal matters. In the U.S. it is discretionary. In Ontario, appeal is only available on questions of law. The author considers the relative modes of procedure including notice of appeal, pre-appeal conferences, the use of transcripts, available staff assistance and for what purposes, the composition of the panel of judges, pre-trial hearing conferences, oral arguments, the means of dealing with appeals without merit, and disposition of appeals. The author concludes that although methods differ the delivery of quality justice is still primary.

ADMINISTRATION OF JUSTICE 1978

ONTARIO

W. G. C. Howland, "Speech on being sworn-in as Chief Justice of Ontario." (1977) 11 Gazette 232.

Chief Justice Howland described his academic and career background over the past 40 years. The author observes that women have taken their rightful place in law, at a 20% rate being called to the bar this year. During his career the court has expanded substantially. Judicial independence and responsiveness are of concern to Justice Howland.

ADMINISTRATION OF JUSTICE 1982

ONTARIO

W. G. C. Howland et al, "Reports on the administration of justice in Ontario." (1982) 16 Gazette 7.

Chief Justice Howland considered the passage of a resolution for a new constitution and Charter and the issue of "undue delay" in the court system. He reviewed the caseloads and work of the Provincial Courts, the County and District courts the Supreme Court and the Court of Appeal. There were new Rules of Practice and the Deschenes Report on judicial independence. He considered the usefulness of pre-trial conferences and preliminary hearings. New court houses were being built. However, the courts only got one-half of the crown attorneys they asked for. Television in the courts was still under study. Chief Justice Evans reviewed the High Court of Justice and its change in composition. Chief Justice Colter reviewed the County and District courts and concluded they were in good shape. Justices Hayes, Andrew and Turner each assessed the courts in their jurisdiction.

ADMINISTRATION OF JUSTICE 1983

ONTARIO

W. G. C. Howland et al, "Reports on the administration of justice in Ontario on the opening of the courts for 1983." (1983) 17 Gazette 7.

Chief Justice Howlands reports on the various levels of courts and concludes that the backlog is under control. Improvements in the County Court and Provincial Court Civil Division have helped. He reports on the work of the Ontario Courts Advisory Council which monitors operations of the courts, and the Bench and Bar Council which monitors the caseload and considers improvements in it and in security. He looks at the Deschenes Report on the independence of the judiciary and the use of pre-trial hearings to speed up the process. Bilingual trials and the use of television in the courtroom are reviewed. Chief Justice Evans reports for the High Court, Chief Justice Colter for the County and District courts, Chief Justice Hayes for the Provincial Court Criminal Division, Chief Justice Andrews for the Provincial Court Family Division and Turner for the Provincial Court Civil Division. In all cases the caseload seems to be under control with some pockets of problems, such as Windsor.

ADMINISTRATION OF JUSTICE 1984

ONTARIO

W. G. C. Howland et al, "Reports on the administration of justice in Ontario on the opening of the courts for 1984." (1984) 18 Gazette 6.

Chief Justice Howland once again reminds the government that the administration of justice is not receiving its proper share of funding in order to perform its duties. Between improvements in funding, new courtrooms and the new Courts of Justice act Howland C. J. envisages considerable improvement. Jurisdictional changes will better distribute the caseload. He reviews the Charter of Rights impact, the Ontario Courts Advisory Council and Bench and Bar work, the Deschenes report on independence of the judiciary and summarizes the work of the various levels of court. Security is of particular concern since the shooting at Osgoode Hall. Television in the courts remains an issue and some filming has been permitted. The author considers, among other things, the videotaping of statements, bilingual trials, the new Rules of Civil Procedure, pre-trial hearings, and courthouse accomodation. Chief Justice Evans reviewed the High Court and its increased workload due to lengthy trials. Chief Judge Lyon reviewed the County and District courts, judicial education, bilingual trials, the strain caused by increased caseload and the creation of the single district court. Judge Hayes reviewed the Provincial court Criminal Division and Judge Andrews considered the work of the Provincial Court Family Division.

COURTS 1985

ONTARIO

W. G. C. Howland et al, "Reports on the administration of justice in Ontario on the opening of the courts for 1985." (1985) 19 Gazette 1.

Chief Justice Howland considers the need for maintaining the Rule of Law and the independence of the judiciary, in light of the Charter of Rights. There continues to be an increase in the caseload and in some cases in the backlog. He considers the work of the Ontario Courts Advisory Council and the Bench and Bar Council. Security and the media in courtrooms continue to concern the Chief Justice. New procedures involving bilingual trials, the handling of preliminary issues, and disclosure come under scrutiny. A Canadian Sentencing Commission has been appointed. The Court of Appeal has had a heavy year with Charter issues. Chief Justice Evans of the High Court considers the various aspects of the High Court including family law issues, Divisional Court, civil and criminal trials, and the work of Masters of the Supreme Court of Ontario. Chief Judge Lyons reviews the work of the County and District courts, case loads, judicial education, bilingual trials, an increase in jurisdiction, and the effect of the Courts of Justice Act. Chief Judge Hayes reviews the Provincial Court Criminal Division and the decrease in narcotics cases. Chief Judge Andrews considers the Provincial Court Family Division and the increasing backlog. Judge Turner discusses the Provincial Court Civil Division.

ADMINISTRATION OF JUSTICE 1986

ONTARIO

W. G. C. Howland et al, "Reports on the administration of justice in Ontario on the opening of the courts for 1986." (1986) 20 Gazette 6.

The impending opening of six more courtrooms is seen by Chief Justice Howland as a potential for relief of the increasing caseload, which is currently just under control. He considers courtroom security, constitutional cases since the Charter, bilingual trials, improvements in courthouse technology, the new Courts of Justice Act and Rules, the work of the Ontario Courts Advisory Council and the Ontario Bench and Bar Council in their supervisory and monitoring roles, and other issues relating to the reduction in delay, the physical facilities and the composition of the court. Chief Justice Parker reviews for the High Court, Chief Lyon for the County and District Courts with its new Criminal Law Amendment Act, Senior Judge Coe for the District Court of Ontario in York, Chief Judge Hayes for the Provincial Court Criminal Division, Chief Judge Andrews for the Provincial Court Family Division and Judge Turner for the Provincial Court Civil Division. All cite increased workloads despite, and sometimes because of, redistribution of jurisdiction.

ADMINISTRATION OF JUSTICE - 1987

ONTARIO

W. G. C. Howland et al, "Reports on the administration of justice in Ontario on the opening of the courts for 1987." (1987) 21 Gazette 1.

Chief Justice Howland provides a general discussion of the "Rule of law" and its opposite, anarchy. Ontario courts have had a heavy caseload with 44 Charter cases. Issues have included full funding for Catholic schools and high damage awards which have been made for personal injuries. Improvements in space provisions in Toronto and Ottawa have relieved the backlog somewhat. However, in anticipation of the release of the Zuber Commission on the restructuring of the courts, there has been a hold on the appointment of judges which has created delays. The Chief Justice considers security improvements, bilingualism in the courts, provincial court salaries, the abolishment of the "Q.C.", extra-judicial activity of Provincial Court Judges, changes in Provincial Court jurisdictions and the work of the Court of Appeal. The Honourable W. D. Parker summarizes the work of the High Court including a test project of two panels in the Divisional Court. Justice Lyon does the same for the District Court as do Judge Hays for the Provincial Court (Criminal Division), Judge Andrews for the Provincial Court (Family Division) and Judge Turner for the Provincial Court (Civil Division).

ADMINISTRATION OF JUSTICE - 1982

A. C. Hutchinson, "The formal and informal schemes of the civil justice system: a legal symbiosis explored." (1981) 19 Osgoode Hall L. J. 473.

There are two primary components to civil justice, the substantive and the procedural. They should be inseparable. The purpose of the article is to explore the general operation of dispute resolution process particularly considering the formal versus the informal branches. The author considers the civil justice system as a whole and its basic distinguishing features. He considers the means by which the court contributes directly and indirectly to improved use of the informal schemes and the resulting "legal symbiosis". The various factors required for dispute settlement and their dynamics are reviewed. The author concludes that the formal and informal systems are functions of one another and that a holistic approach must be taken.

PUBLIC LEGAL SERVICE 1983

CANADA

R. W. Ianni, "Are lawyers failing to meet the existing demand for legal services?" (1983) 6 Can.-U.S. L. J. 152.

The author reviews the limited data available on numbers of lawyers practicing, their location, the types of legal services provided and public access to them, and needs for additional legal services. There have been non-Canadian studies on the subject but only one in Canada. The author decries the limited data available. The American studies establish the unmet needs of the public without making recommendations or determining why these needs go unmet. The author concludes that a similar situation exists in Canada. The author considers the law school role in solving the problem by curriculum changes and the establishment of legal clinics.

COURTS 1983

CANADA

J. S. P. Johnson, "The role of the courts in environmental law."
(1983) 25 Criminal L. Q. 304.

The author is a judge with a particular interest in the environment. The Constitution Act of 1867 did not contemplate environmental legislation. Most cases are heard in provincial court as criminal offences under the Fisheries Act of Canada. A difficulty occurs because of the different degrees of culpability found in environmental law. There is often an absence of mens rea and some pollution is permitted out of necessity. Damage need not be shown, only that pollution has occurred. What of the de minimis rule? The response to this is the concern over accumulated pollution. The jurisdiction of the courts in such cases extends to remedies such as injunctions, often the complete closure of an operation given that the damage is potentially to the population as a whole. The author concludes by asserting that the crime of pollution must be recognized as harmful to all mankind and that the victim and the damage may not be apparent for generations. Private prosecutions by citizens do not produce the best results. Preventative measures are most appropriate and the correct forum should be established. The author concludes by expressing a confidence that solutions will be found to ensure the survival of the planet.

CANADA

H. A. Kaiser, "Legal services for the mentally ill: a polemic and a plea." (1986) 35 U.N.B. L. J. 89.

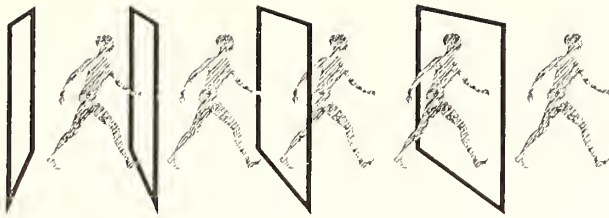
The legal needs of the mentally ill are not being met partly because there is not enthusiasm to do so. Their problems are complex and intertwined with other basic social problems. The problems of the institutional patient are specifically not addressed at this time. The author makes a number of specific recommendations for improvements which involve a better understanding of the problem and a willing relationship between the medical personnel and the legal personnel and a greater number of lawyers entering this field of specialization.

COURTS 1980

ONTARIO

G. Killeen, "An analysis of Ontario High Court and County Court civil and criminal statistics: 1976/77-1978/79." (1980) 16 Rep. Fam. L. (2d) 351.

The author summarizes the functioning of the Court of Appeal, the Divisional Court, the High Court, the County and District courts in Ontario. He looks at both the criminal and civil divisions and assesses changes in the case load and distribution.



Conference
on Access to
Civil Justice

Congrès sur
l'accès à la
justice civile

Access to Justice: Including the Poor

**Notes for a presentation to the
Access to Civil Justice Conference**

**by Havi Echenberg, Executive Director
National Anti-Poverty Organization**

June 20, 1988

Toronto, Ontario



Access to Justice: Including the poor

In a presentation that leaves not a single access issue unexamined, Mr. Roman has enumerated disadvantaged groups: Natives, disabled persons, women, visible minorities, older Canadians. While each of these identifiable groups has shared concerns peculiar to that group, they are also overrepresented among Canada's poor. I have been asked often whether I really believe that throwing money at poverty will solve it. I always respond that it's a great way to start. By itself, though, it will not work, and some of the solutions are within your jurisdictions and within the realm of fiscal and budgetary possibility.

Before addressing some of these affordable and practical measures, I must make a brief case for increasing incomes to increase access to justice. There is little doubt that providing poor Canadians with lawyers is better than denying them legal services. But adequate incomes would not only allow them to purchase their own legal services; they would also spare them much of the injustice that leads them to the courts in the first place.

The data published by the Canadian Centre for Justice Statistics show that a large percentage of the civil legal aid cases undertaken are divorce cases. But the data mask other access to justice and poverty issues. First, civil legal aid plans often include little more than family law. Second, divorce may be the only civil legal issue that is sufficiently mandatory that a poor person would learn about civil legal aid and find out how and where to access the service. Third, women seeking divorces are often previously middle-class, recently deserted individuals who are suddenly without income; that is, women seeking divorces may be seeking legal termination of their marriages as a way to ensure that their poverty (and their attendant eligibility for legal aid) is short-lived.

I would argue that poor people, in overgeneralized terms, are usually non-litigious. In my experience, which includes talking to low-income activists and organizations about legal aid, poor people know about legal aid only if they have had occasion to interact with the criminal justice system. Since the criminal system has a non-voluntary entry point at which the right to representation is clearly explained to the entrant, awareness of access to lawyers, at least, is almost always guaranteed.

Even in those provinces in which legal representation before administrative tribunals is included in civil legal aid services, news of the availability of the service is often a surprise to the lucky individual who finds out about it. Poor people generally know that they are being unfairly treated; they are often surprised, however, to learn that this treatment is also illegal, and that they are entitled to fight it legally with full representation.

Some jurisdictions routinely inform social assistance recipients of their right to appeal and of the procedure to do so; to my knowledge, this information does not routinely include advice to the individual as to how to secure representation for such appeals. To even inform potential clients of availability would be to enhance their access.

But to inform effectively, such information must be dispensed routinely. It must be included on all notices of decisions, and it must be provided orally (to get past the barrier of illiteracy and visual impairment); it must be provided plainly in every relevant language (to meet the needs of refugees and immigrants who have mastered neither of Canada's official languages and other Canadians without legal training); and it must be relevant to any circumstances peculiar to some groups (i.e., spelling out any variations on rules that might pertain to administration of social services by some native Indian bands).



I can hear the silent groans, as I list all the barriers to receiving information, much less to the legal system. But the fact is that many disadvantaged people have more than one strike against them at a time. It is, in my view, not surprising that poverty, unemployment and illiteracy rates are often closely related in each province and region. These barriers are not the stuff of which small-l liberal ideology is derived. They are real to the thousands, even millions of Canadians, who face them in their daily lives. If you're serious about including the excluded you have a big job ahead. Even if you intend to do no more than advise them of availability of service, you'll have to pay for more than middle-class media that are meaningless and useless to many disadvantaged Canadians.

I know from discussions with some of you that you are concerned with stimulating demand for the legal aid services that you do fund. (And I'll come back to those you don't fund).

.../5.

I had an interesting conversation with a lawyer who had participated in a pilot project to deliver legal aid service to rural communities. She told me that the project demonstrated that the services had been used largely as a substitute for common sense: where neighbourly discussions and even arguments had resolved civil disputes prior to the pilot project, the litigation route was now followed. While we could argue that poor people, and even rural poor people, have the same right to abuse the courts as rich ones, that's certainly not my major concern. The right of poor people to pursue every remedy available to them to ensure their continued entitlement to social assistance, worker's compensation, unemployment insurance, pension benefits, student aid, affordable accomodation, or basic services is of paramount importance to me. And to them.

Because few-- if any --of us in this room ever wondered whether we would have a place to sleep next week, or whether we would eat tomorrow, or whether we could afford the non-prescription drugs that make our chronic pain bearable, it is tempting to be academic or bureaucratic or policy-oriented or political in our discussion and assessment of these issues.

.../6.

Regrettably, the nickle-and-dime issues are the ones that plague the poor, the ones that can lead to family violence, addiction, petty crime, emotional despair, physical illness. Because of that reality, in many ways the poverty law components of civil justice--landlord-tenant, social assistance or UI appeals, small claims court--are not just justice issues. They constitute challenges to survival for the poor.

The inclusion of these cases in civil legal aid plans is therefore the most important way to include the excluded-- to include them in our communities, as well as the civil justice system. To make them aware of the availability of such services-- with all the variations of media already described-- is a prerequisite to access. It may not assure access but, without it, the existence of the services will only make it easier for us to sleep easily at night. It won't do a thing for them.

Any effort to de-judicialize these areas of law should not be presumed to obviate the need for advocates-- whether trained law advocates or lawyers. While the informality of a certain tribunal or court, its failure to follow rules of evidence, the absence of gowns may make us more comfortable in them, poor people will not want to enter unrepresented.



Poor people know that their reality hasn't usually equipped them to argue effectively their own case, whether the arbiter is a judge or a mediator or an administrative tribunal of lay people. Almost always, a poor person is having to counter the acts or decisions of someone with greater power-- a landlord, an employer, a social worker, a bureaucrat. The poor person's opponent almost always has great power over the poor person because the opponent controls access to something essential--housing, income, employment, entry into a training program. Whatever the venue, whatever the rules of procedure, any sense of justice requires that power imbalance to be corrected by the presence of an advocate.

I was interested in Andrew's comments on standing, on class action, on test cases. I have observed, and have come to understand, the trend in some jurisdictions to seek social change through court decisions, when attempts to effect changes through the legislative process have proved unsuccessful. While I am not accustomed to seeking social change from the actions of lawyers and the decisions of judges, there is little doubt that the Charter, the application of anti-discrimination prohibitions in human rights legislation to basic services like rental housing, and the standing victories referred to by Mr. Roman have caused even me to reconsider.

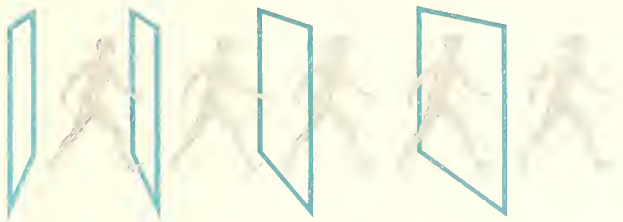
If governments rely exclusively on economic growth fuelled by the private sector to meet the needs of the poor, the poor will be forced, increasingly, to find ways other than through new programs to survive. The enforcement of legislation intended to provide for them when government programs fail to do so is an attractive approach.

While access to justice in its broadest and most meaningful sense can be assured only through the redistribution of wealth, services and goods, access to the legal and courts system requires less radical solutions. Expansion of legal aid to include all areas of poverty law, dissemination of information through all necessary media, full representation before all tribunals and courts, settlement of standing questions are among them. You will also want to consider legal education targetted to poor and otherwise disadvantaged individuals, outreach through existing networks, and the development of programs designed to serve the clients rather than the courts.

I am confident that access to legal and court systems is within financial and bureaucratic reach of all provincial governments and the federal government, and I have the support of my organization in encouraging you to provide that access.

Thank you.





Conference
on Access to
Civil Justice

Congrès sur
l'accès à la
justice civile

ACCESS TO JUSTICE CONFERENCE

June 20, 1988

BARRIERS TO ACCESS: INCLUDING THE EXCLUDED

Draft #3

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EXECUTIVE SUMMARY

BARRIERS TO ACCESS: INCLUDING THE EXCLUDED

A.R. begins his paper by exploring the idea of "civil justice"; he is particularly concerned about the tendency to equate justice with whatever is dispensed by courts. He laments the fact that access to justice often amounts to little more than access to lawyers - and then only imperfectly.

In the first major part of the paper, there is an explanation of how, although access to lawyers is provided, different rules and procedures operate to deny access to justice. Emphasizing the important distinction between availability and access, he demonstrates why having a lawyer will not necessarily help a disputant's desire for justice. In particular, he peruses the lack of an effective class action, the inadequacy of standing provisions, the persistence of bureaucratic non-conformity and the "corporate mentality" of the Crown law office.

In the second major part of the paper, he turns to situations in which access to lawyers is itself limited; his underlying theme is the capacity of law to create social change. It is not so much a question of lack of legal representation, but more an issue of a failure to make the right kind of representation available. He thinks that a reduction in cases litigated will fire up valuable resources for more productive forms of social advocacy and action on behalf of the poor.

He concludes his paper by appealing for a major overhaul of the justice system and not simply a modest tinkering with it of the excluded out to be included. He offers a short, eclectic list of reforms for consideration, including improved funding, re-orientation of legal aid, fundamental reform of substantive law and procedure, increased private dispute resolution, and governmental reorganization.

"I am not here to dispense justice. I am here to dispose of this case according to the law. Whether this is or is not justice is a question for the legislature to determine."
[Sir Thomas W. Taylor, Chief Justice of Manitoba, 1887-99, as quoted in Law Society Gazette xxi: 3/4, Fall 87]

INTRODUCTION

The preparation of this paper has been like a voyage of discovery. I seem to have sailed around the world, only to end where I started. My assignment was to provide answers to three questions:

- i) who are the excluded?
- ii) why are they excluded?
- iii) how can they be included?

This sounded easy enough. After all, we all know who is excluded don't we? And it's obvious why. Once we explain that, the solution is right at hand isn't it?

In the process of looking for answers, I have read through a pile of paper higher my knee. I can now understand the feelings of the judge of the Court of Appeal of England who was well and truly put in his place by the formidable barrister F.E. Smith, later Lord Birkenhead, Attorney-General of England.

"Mr. Smith" the judge said, "I have read carefully all of your memorandum and, at the end of it all, I find that I am none the wiser."

"Perhaps not, My Lord", Smith said gently, "but certainly better informed."

While I cannot answer those questions put to me with any greater certainty than at the beginning of my search, I am certainly better informed. I now know that the literature is long on speculation but short on facts. Unfortunately, even this speculative writing is mostly about the courts. There is much discussion about whether our society is becoming too litigious and what to do or not to do about it. Very little of the research looks at the civil justice system as a whole. But I only became aware of this when the three questions were examined in depth.

ACCESS TO WHAT?

We all talk glibly about access, but what do we mean? Access to what? That, it seemed, was the first question. Before we can talk about including the excluded, it is important to know what we wish to include them in. The principal barrier to reforming the system seems to be a lack of understanding and agreement on what 'the system' really is, how it works, and how it should

work. Even the vocabulary with which to analyse these concepts is lacking.

All too often we use the phrase 'access to justice' as synonymous with access to the courts. As the quotation from Sir Thomas Taylor suggests 'justice' used this way is really a euphemism, like describing the federal government's law office as the Department of Justice.

The very organization of government makes it difficult even for those at the apex of the legal system, to think about 'the civil justice system' as a whole. In Ontario, as in all provinces, although the courts report to the legislature through the Ministry of the Attorney General most administrative tribunals do not. Labour relations boards, for example, traditionally report through a Minister of Labour and welfare tribunals through various Ministries but not usually the Attorney General. Hence, the focus of this conference like so much of the thinking in these ministries, will inevitably be on the courts of law. This is a mistake.

If we stop to think about it, most lawyers recognize that most labour law - 90% or more - is not practised in the courts but before labour relations

boards and arbitrators. Similarly, almost all environmental law is practised before environmental assessment boards or planning tribunals such as the Ontario Municipal Board. Most landlord and tenant rent disputes are decided by specialised tribunals; likewise social assistance appeal mechanisms and workers' compensation. At the federal level there are specialized tribunals dealing with unemployment insurance law and immigration law. Most of these tribunals are not new. As far as most ordinary members of the public are concerned, it's been at least thirty years since the courts were "where the action is" in respect to civil litigation. Yet we all know even less about these tribunals than we do about the courts. Academic legal scholarship and law reform commissions have largely ignored them. [The Law Reform Commission of Canada has done some limited work in this area but most of the quality work is now severely dated. In my respectful submission, most of the recent work is both scant for the resources spent on it and unfortunately pedestrian.]

Many litigation lawyers now spend most of their careers appearing before one or at most a few boards, rarely appearing in court. Although at present there are no statistics to confirm it, I would guess that the total number of person hours spent by Ontario litigation

lawyers on tribunal related matters exceeds those spent in the courts. That is especially true of those working on legal aid matters, particularly in a clinic setting. I find it surprising that so little thought or scholarship has been devoted to a part of the system that grows in exponentially in importance year by year. One of the results of this conference may be to encourage new research by the various Ministries of the Attorney General, the Centre for Justice Statistics in Ottawa, and legal academics, to integrate the proliferation of federal and provincial administrative tribunals into a more realistic, contemporary view of the civil justice system.

It is often asserted that in Canada today, the rich can afford lawyers, the poor have legal aid and it is the middle class is excluded. I could find no evidence to support this view because information on litigation consumption by income class is not available. Even if this were not the case, however, we would need to define terms before proceeding with any meaningful evaluation. What do we mean by litigation? Do we mean tribunal advocacy or only matters before the court? Even in the judicial setting, does litigation comprise all of the cases filed in a court or only those decided by a judge following a trial? The difference between these

two is extremely important since approximately 90-95% of all cases today are settled without a trial.

In one view, if the purpose of going to court is to obtain an authoritative adjudication of one's dispute from a neutral and specially trained outsider, than many of those who settle are denied access because they are forced, by cost or delay, out of the 'adjudication market' into the 'settlement market'. In another view, the real function of the courts is to create settlements via negotiation "in the shadow of the law", with adjudication being required only for a minority of pathological cases which the parties refuse to settle. Is the issue access to adjudication or is it access to the settlement mechanism? One's perception of the adequacy of access will differ depending upon whether one sees the principal purpose of litigation as being dispute resolution (adjudication) or dispute processing (mostly settlement). Dispute resolution is the function of judges; dispute processing works quite satisfactorily even if all but a handful of cases are never presented to a judge.

But are settlements preferable to adjudicated results? There is no consensus. Some believe a settlement is preferable because it is a resolution

determined by the parties themselves rather than imposed from outside by a stranger who cannot understand their real goals or aspirations. Others see this as an idealised, even elitist description, given the inequalities which often exist between litigants and the ability of the one with the deeper pocket to impose a settlement which is largely in its favour.

BARRIERS TO ACCESS

There is an important distinction to be made between availability and access. [I am grateful to a thoughtful article by Doyle and Visano which discusses these issues carefully. R. Doyle & L. Visano, "Equality and Multi-Culturalism: Access to Community Services", Journal of Law and Social Policy, Vol. 3, Winter 1988, p.21 at 25.] Availability refers to whether a service exists or is provided for clients, whereas access refers to whether a service is actually secured by a consumer. The difference between availability and access is caused by barriers. Hence, to examine barriers to access, we should look at the gap between what is available and what is accessible.

To start with the simplest example, even the most expensive downtown Toronto corporate law firm is 'available' to any potential client in Ontario, in the

sense that it's there and anyone can walk in and retain any lawyer in the office. There are several reasons why that doesn't happen in practice. The most obvious of these is cost, but even if that could be overcome there are others: information and awareness; physical-/geographical barriers; cultural/linguistic barriers and so on.

But here we are only talking about access to lawyers and, as any member of the public will hasten to tell you, this is not to be equated with access to justice.

TWO CONCEPTS OF JUSTICE

There is an unfortunate tendency in the academic literature to measure access to justice by quantitative measures of specific units of litigation services provided. Also, the Court Statistics Annual Report produced by the Ministry of the Attorney General of Ontario is full of data about proceedings commenced, disposed of and pending in a fiscal year. These are broken down by type and by level of court. Similarly, there are statistics on how many actions were commenced under various types of statutes, by jury and non-jury, and how many notices of garnishment were issued by judicial district or county. For clinics operating under

the legal aid plan, statistics are kept on the number of files opened and the types of issues involved. All of this can fairly be described as part of the system of legal justice. But it is only a small part of the concept of justice.

Unquestionably, legal justice is a component of a broader notion of justice, although whether it contributes to or detracts from it is a matter one could debate. Justice is about results; legal justice is about hearings. Justice is about economics and politics; legal justice about courts and tribunals. Justice is the preoccupation of ordinary citizens and philosophers; legal justice is the preoccupation of lawyers and judges. Whose concept should be used in considering access? The easier route would be to take the lawyers view, and to devote the rest of this paper to an analysis of statistics on the output of the court system. The more difficult but more interesting view comes, I think, from using the broader definition.

Since at least the time of Plato, a great deal of excellent writing has been devoted to the question "what is justice?". I have no new answer to offer philosophers. But to the ordinary person, agreement on a reasonable definition may be possible. To the ordinary

citizen, having a fair hearing is of limited value if the final outcome is palpably unfair. Results count; process is merely the means to an end. Unfortunately, in all too many situations lawyers can contribute very little to that kind of a just result. There are barriers to justice which can render access to lawyers and courts virtually meaningless.

WHEN LAWYERS CANNOT HELP

As we have noted, there is a tendency to equate justice with lawyers and to assume that when everyone has his or her lawyer, all of our access to justice problems will be solved. But that is to overlook the practical difference between access to justice and justice. Note that the promise to give everyone access to justice is not the same as the promise to give everyone justice. Legal justice may be accessible, but social justice still far away. The preoccupation of legal policy makers with court statistics diverts their attention from other important ways in which real justice is made inaccessible. In Heaven there are no lawyers; in Hell, everyone gets his or her full measure of due process.

Perhaps the best way to sever the mental ties between access to law and access to justice is to think of situations in which one may have a lawyer and adequate

resources to pay for legal services, but that still doesn't help. What might such situations be?

No Cause of Action

In some instances, a lawyer will advise the client that no amount of money will help because there is simply no way the client can succeed in court. This can happen for several reasons. First, there is no "cause of action" available to the individual.

Consider a small rural community around a beautiful, clean lake. A large industry locates at one end of the lake and begins to spew particles and fumes which create a nuisance for everyone in the community. An irritated resident consults a lawyer only to be told that the plant is creating a public nuisance rather than a private nuisance and, therefore, no individual has standing to sue. Only the Attorney General can sue, the client is informed, and since the plant was built with a large development grant from the province (or is owned by a crown corporation, or was approved after an environmental assessment hearing), the Attorney General may well do nothing.

If someone dumps garbage on another's lawn, that is merely a private nuisance, which is actionable.

However, if one creates a nuisance for the entire community, it is not. Paradoxically, the more widespread the damage the more restricted the right of individuals to sue.

Despite the fact that public concern about environmental matters has made the environment a leading political issue for all levels of government, and despite the fact that this absurd law of public nuisance has been around for centuries, and despite the fact that the Law Reform Commission of Ontario has been studying the question of standing for several years, nothing has been done about it.

Interestingly, there are very few public nuisance cases reported in the law reports. That is not because there are very few public nuisances. It is because every lawyer knows that one cannot bring a public nuisance case, and so they are not brought. In the current state of the law, access to a lawyer does not give the victims of public nuisances access to justice.

No Class Actions

Consider another situation (based on a real case in Quebec): an advertisement appears in newspapers and magazines offering a set of cutlery at a very

attractive price to those who mail the coupon and \$25 to a mail order business. There are many respondents to the ads, and a substantial portion discover that the cutlery either never arrives or is short one piece. There is no economical way one can sue a mail order company for the price of a steak knife. This fact provides a great opportunity for unscrupulous merchants to obtain unjust enrichment. The only effective redress is through the device of the class action.

In Canada, only Quebec has legislation which makes class actions feasible in this kind of case. [Rules permitting class actions exist in theory in other provinces but since the decision of the Supreme Court of Canada in General Motors v. Naken 1980 ___ DLR (3rd) ___, it is clear that these rules cannot be used effectively.] Even in Quebec, the rules have been so restrictively applied as to exclude a very large proportion of the situations in which class actions could be used.

We live in an age of mass marketing, which can create mass wrongs. Yet the law's preoccupation with the traditional 'A versus B' model of litigation renders it inherently hostile to any concept of mass remedies. In an age in which the long latency periods for numerous chemicals can produce a sudden discovery of mass

injuries, for example, asbestosis, the continued insistence that mass wrongs be litigated individually frequently produces bizarre, unjust results. [For example, in the Dalkon Shield litigation in the United States, it was the company which tried to push the court for a class action, over the objections of the plaintiffs lawyers, who stood to benefit most from contingent fees and individual actions.]

In the case of asbestosis, Johns Manville, the defendant, unable to create a compulsory class action under the regular court rules, used the bankruptcy rules to achieve a similar result. [The Robins company, the defendant in the Dalcon Shield case, has now followed suit.] This, ironically, allows defendants a mass escape route to avoid the costs of a multiplicity of claims, while individuals are forced to sue individually or simply to "lump it".

The unsophisticated criminal who steals \$25 at the point of a gun stands a good chance of being caught, convicted and sentenced to jail. The more sophisticated white-collar con artist who steals \$25 from thousands of people at the point of a pen may, if caught and convicted, be given a small fine for misleading advertising.

Consumer advocates have emphasized the need for class actions in Canada for decades. The Ontario Law Reform Commission completed a definitive 900 page study of the subject in 1982. The study was endorsed, with proposed changes, by the Canadian Bar Association and the Public Interest Research Centre. It continues to sit on the stove of the Attorney General of Ontario, but on the back burner. In other common law provinces, it isn't even on the stove. This is another area where access to lawyers is not likely to result in access to justice.

Standing Problems

A third area, closely related to the first two, is the law of standing. It is important to understand the relationship between standing, causes of action and class actions. A cause of action refers to the asking of a legal question, or a complaint recognized by the law. If one does not have a cause of action it is because the complaint raised is not one recognized by the substantive law. The inability to bring a class action arises for a different reason, because the rules of civil procedure, that is procedural law, do not create a convenient way in which individual claims can be treated on a representative (class) basis.

The third situation, lack of standing, arises when there may be a cause of action but the particular plaintiff is deemed to have an insufficient interest in raising it. For example, until fairly recently [the Thorson case] an ordinary citizen was not permitted to bring to court an action challenging the legality of governmental behaviour unless he was more particularly affected by the legislation than the public at large. So great was the law's fear of busybodies and the risk that they would bring 'frivolous and vexatious' litigation that implicitly the law preferred a policy of allowing government illegality to go unchallenged rather than exposing the court to the risk of busybodies. In general, that still seems to be the policy, although it has been relaxed somewhat in the narrow area of constitutional and administrative law. [See also McNeil, Borowski and Finlay. The extent of this liberalization is by no means clear.]

What is most significant about these standing cases is that virtually all of them are brought against the government and, in most of them, the government loses. In my own studies of the law of standing I have come to the conclusion that although there may be some risk of over-zealous busybodies, the risk of abuse is far greater from over-zealous crown lawyers raising largely

frivolous and unjustified standing challenges as a way of excluding potentially meritorious litigation which may be politically embarrassing if it succeeds.

No Department of government enjoys being told by a court that it has exceeded its lawful powers or conducted itself illegally. That is sufficient embarrassment to make any Minister grateful if the lawyer can delay a hearing of the case on its merits for, typically, the five years it takes for a standing challenge to work its way up to the Supreme Court of Canada.

This is important for two reasons. First, most of the litigation of relevance to the poor, environmental interests and other under-represented individuals or groups, whether a normal civil action or a judicial review application to set aside a decision of board or tribunal, has the Government or some government agency as the defendant. Most poverty lawyers, environmental lawyers, consumer lawyers - public interest lawyers generally spend the majority of their time fighting not corporate litigants but government bureaucracies. Thus, from the tax-payers' standpoint, legal aid and the crown law office function largely as isometric exercises: we pay for each arm to press against the other.

Most public interest lawyers will be aware of the pitfalls of the law of standing and the ease with which an action can be derailed for many years on that ground. Where the client is not legally aided the advice must be that fighting a standing challenge can easily cost \$50,000. Whether or not the client is legally aided it can occupy several years, during which time the client is merely fighting for a day in court. Thus, from the moment the standing challenge is brought, the client is a loser.

The most he or she can win the right to go back to the beginning, to restart the lawsuit many years and many thousands of dollars later; at worst, even after all of this there will be no day in court to try the case on its merits. A very high percentage of clients will, quite sensibly, give up when they are told these facts, recognizing that their cases simply will not be of any relevance after so long a delay. This barrier to access does its job invisibly - without producing any statistics - but most effectively.

My impression of standing cases is that even if the right to standing is eventually established, the mere fact of the standing challenge so depletes the client's

NOTES

- ¹ That does not mean at all that law really is universal. We find particularistic legal systems even in modern societies, cf. Macaulay 1963, Moore 1978, Gessner/Plett 1987.
- ² According to Weber (1921/1976). Cf. Nonet/Selznick 1978, Teubner 1983.
- ³ This principle was originally meant only for redress against the state itself. But it is now interpreted as a basic right of access to justice in general, i.e., also for those involved in an individual civil disputes.
- ⁴ More constitutional regulation is related to criminal matters, especially that there is no death penalty; that no one may be sentenced if the crime was not under penalty at the time when committed; and a rule comparable to *habeas corpus*.
- ⁵ To mention only the major acts and codes dealing with civil justice, we find: the court organization act (*Gerichtsverfassungsgesetz, GVG*); the German judge act (*Deutsches Richtergesetz, DRiG*); the attorney-at-law act (*Bundesrechtsanwaltsordnung, BRAO*); the code of civil procedure (*Zivilprozeßordnung, ZPO*); the court fee act (*Gerichtskostengesetz, GKG*); the judicial cost act (*Kostenordnung, KostO*); the attorneys fee act (*Bundesrechtsanwaltsgebührenordnung, BRAGO*); two insolvency law acts (*Konkursordnung, KO*, and *Vergleichsordnung, VerglO*). All these laws are federal laws.
- ⁶ Legislation on the courts was one of the very first tasks undertaken by the Bismarck state when several German territories were united into a federal state. The so-called *Reichsjustizgesetze* (judicial laws of the *Reich*) were to serve the unity of the newly-established state.
- ⁷ The division is presently made at DM 5000 (equalling ca. C\$ 3570). If both parties agree, the county court may also take claims for an amount above that limit, and the district court for an amount below.
- ⁸ There are, however, some restrictions, i.e., the federal court does not take every lawsuit for review. There must either be an amount of at least DM 40,000 (some C\$ 28,600) left in controversy, or

the suit must be of general importance. -- The stages of appeal just described are (as an exception) given in family lawsuits although they start at the county courts. This exception is grounded in tradition, because originally the district courts decided on divorce. When the family courts were established at the county courts (see below), the way of judicial review should not be shortened. Therefore the appeal in family suits goes directly from the county courts to the high court, and possibly from there to the federal court. Under exceptional circumstances, decisions by the district courts may be appealed against directly at the federal court.

- ⁹ There are 10 panels for civil suits at the federal court. As to the number of courts and decision-making bodies below the federal level, see table 1 in the appendix.
- ¹⁰ Bender 1979 describes it more exhaustively than I can do it here. His article has been written shortly after the last major reform of 1976, and gives an account of that reform history at the same time. The information given by Bender are still valid.
- ¹¹ Even serving of process to the defendant is generally arranged by the court with which a complaint has been filed. It has to be combined with a request to the defendant to declare whether or not s/he will defend, and if so, to commission an attorney when required, as is the case in district court proceedings.
- ¹² The code of civil procedure provides for minimum periods. An extension may be granted if applied for. See for the deadlines, and how they cumulate, Bender 1979:443-447. The shortest duration of normal proceedings until a final judgment is three months, the longest (with no extension or adjournment) seven months.
- ¹³ The intensity of the discussion depends very much on the personality of the respective judge. The variety goes from the mere question if the parties could not settle instead of processing further to "talking into settlement".
- ¹⁴ See table 13 in the appendix; for the interpretation of the table, it is important to know that every judgment on the subject matter counts as final judgment independently of whether or not evidence has been taken.

- ¹⁵ To give just two examples: if a landlord sues a tenant to make the apartment free, the "value" is the rent of one year; a divorce is "worth" the spouses' income of three months.
- ¹⁶ The parties may waive their right to a written opinion if they waive their right to appeal, or no appeal is possible because of the requirements not met.
- ¹⁷ A lawyer may bill her or his client with an overall sum on the basis of the importance of the case, taking into account the contents and the difficulties of the work to be done and the financial situation of the client as well. However, this kind of billing is rather unusual except for corporate-associated (but free-practicing) lawyers, because recovery from the opponent (see below) is limited to the amount of the statutory fees anyway.
- ¹⁸ This was only a very rough overview. There are specificities for the costs of proceeding before appellate courts which cannot be dealt with here. Cf. Plett 1987 for more details and examples regarding the amount to which litigation costs sum up under these regulations.
- ¹⁹ Cf. Rehbinder (1976) for a summary of this critique and the subsequent reform proposals.
- ²⁰ Now called *Prozeßkostenhilfegesetz* (statute concerning legal aid with litigation costs). It was incorporated into the code of civil procedure. Cf., for its contents, Deppe-Hilgenberg 1987:344ff.
- ²¹ Called *Beratungshilfegesetz*; cf. Deppe-Hilgenberg 1987:437ff. -- Surprisingly the costs are, according to an empirical study, the least important reason for avoiding litigation: many of the interviewed even thought that getting legal advice and litigation are more expensive than they actually are (Reifner 1981a:410ff). This may be proved by some figures showing for how little monetary value at stake -- with respective relatively high proceeding costs -- people actually sue (cf. tables 7 and 9).
- ²² The following is resumed by Reifner (1981a); cf. also Raiser 1987:190-201.
- ²³ This is regulated by the so-called legal advice act (*Rechtsberatungsgesetz*), a law that was originally issued by the Nazis to "protect" the Aryan lawyers from competition with their Jewish colleagues. The

justification for keeping this law (after having the clear Nazi regulations removed) is seen in that dealing with legal matters is part of a public affair, requiring special education (cf. Reifner 1981b:179-80). Associations (including trade unions) are entitled to give legal advice only to their members. Therefore it was a progress when the consumer advice centers were given the right to provision of legal advice to whomever contacting them.

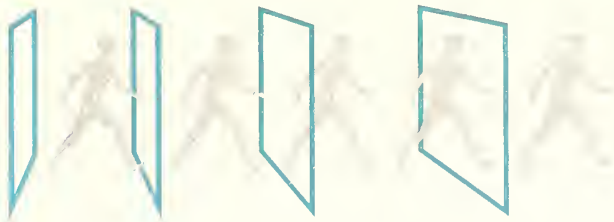
- ²⁴ Actually the risk of indeterminacy of the outcome functions as the barrier of second importance in the perception of those concerned (Reifner 1981a:408).
- ²⁵ I hold to the connotation of the terms "dispute" and "conflict" that has been given to them by U.S. American scholars: dispute meaning a quarrel between two individuals (even if one of the individuals is a business, a corporation or maybe even government), and conflict depicting trouble in society between different groups of that society.
- ²⁶ It has to be noted here that class action is unknown to the West German law.
- ²⁷ Or, more precisely: at ordinary courts in civil divisions, chambers or senates; but the differentiation between civil and criminal matters has been made so early, that we became used to speaking of civil courts and criminal court. There are only very few courts left, where the judges have to sit in both criminal and civil proceedings.
- ²⁸ Additionally, it has to be considered that not every *Amtsgericht* has a family or bankruptcy division, i.e., the access to specializing courts is even farther.
- ²⁹ Originally the panels comprised three judges at the district courts, five judges at the high courts, and seven judges at the supreme court (the then *Reichsgericht*). From 1924 on, we have only three judges at the high courts and five judges at the *Reichsgericht*. Cf. Dessauer 1928:33-38, for the implication on the quality of justice.
- ³⁰ The presiding judge has to ask the parties, immediately after filing, for their consent which is still necessary. Judge Bender who developed the Stuttgart model, does not consider this a proper means for achieving the goals of efficiency and acceleration. For the reasons, see Bender 1979:461.

- ³¹ "The fact that at the court hearing the parties can relate everything that has been bothering them is extremely important psychologically. In many cases, winning the lawsuit is not even their primary interest. Frequently, it is entirely sufficient if they can tell their problems to a neutral body, which will then instruct them what a fair solution would be. This accounts for the extraordinarily high percentage of settlements attained by the judicial bodies practicing the Stuttgart Model" (Bender 1979:455).
- ³² Legal education is also regulated by statutory laws. Therefore the universities could not just start with a new curriculum, but an agreement of the federal legislator was required. This was given only temporarily; cf. Plett 1986.
- ³³ Arbitration, too, is a private justice system, but it has been regulated by the code of civil procedure regarding some indispensable safeguards: nobody can be forced into this procedure against their will and minimum standards of the procedure itself; if these are not observed, redress is possible to the official courts.
- ³⁴ There are more alternatives available in West Germany. Especially the ÖRA and the institution of the *Schiedsmann* have been described also to an international audience (cf. Falke et al. 1978; Bierbrauer et al. 1978). However, these once "promising institutions" do not really mediate disputes (the ÖRA mainly provides for legal advice; regarding settlement, it just certifies them), or they do not have any actual significance to civil disputes (the *Schiedsmann*), cf. the recent study by Jansen (1987).
- ³⁵ Compared with that, the period it takes from filing a suit to getting a decision from the federal court (cf. table 6) turns out to be perhaps longer than assumed. But these periods include the times the lower courts need to issue the written opinion and the notices given to the parties for deciding whether or not to appeal against a judgment.
- ³⁶ See also Schuster/Siebert 1985 and Wollschläger 1981 for court caseload time-series studies. Cf. Galanter 1983 for similar findings in the United States.
- ³⁷ Cf. the direction of concern, which is indicated by the general themes of the last three international congresses on procedural law: from "justice with a

human face" via "effectiveness of judicial protection and constitutional order" to "efficiency in the pursuit of justice" (cf. Gilles 1977, 1983a, 1987).

- ³⁸ To be more accurate: this applies only to plaintiffs, whereas a defendant usually has an interest in delay. Therefore party control over the litigation pace seems to be "a recipe for delay" (Cappelletti/Garth 1984:253).
- ³⁹ This can already be observed at the West German county courts, especially in cases where no appeal is possible: many decisions are not meeting the state of judicial art.
- ⁴⁰ This has, for West Germany, been proved by an empirical study on success in litigation (Bender/Schumacher 1980).
- ⁴¹ Cf. Reifner 1981a. -- Cf. above at footnote.
- ⁴² This becomes evident if we look at consumer problems. They are an occurrence of the mass society, but have to be pursued individually if the procedural system does not provide for class action.
- ⁴³ This may be different in countries with the common-law system, where the development of substantive law is still a task of the courts. However, the civil-law and the common-law systems seem to converge regarding legal development through adjudication and legislation. Moreover, it is very difficult to fight for a precedent, so that the present substantive law is the starting point for any dispute processing, even outside the courts of law (cf. Mnooking/Kornhauser 19).
- ⁴⁴ The widest contribution to the knowledge of civil disputes has been made by the Civil Litigation Research Project, conducted at the University of Wisconsin-Madison Law School; see Trubek et al. 1983a, and the articles in 15 Law & Society Review issue 3/4. Although the system within which this research has been undertaken was the U.S. American with its own specificities, the results have been widely used also in Europe for theoretical explanations.
- ⁴⁵ I do not want to cite all references; many are found at Roth 1983:286-88. The most important one regarding the access problem is the extensive work compiled by Professor Cappelletti with

contributions by commentators from almost all over
the world (Cappelletti 1977ff.).



Conference
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Congrès sur
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**CRITICAL MOMENTS IN ACCESS TO JUSTICE THEORY:
THE QUEST FOR THE EMPOWERED SELF**

by

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**Paper presented at the Conference on Access
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*This paper is part of a larger project I am conducting with Lisa Bower of the Institute for Legal Studies and the University of Wisconsin Department of Political Science. Ms. Bower's contributions to this essay are gratefully acknowledged.

It no longer makes sense to speak of an "access to justice" movement in the United States. While this phrase once served as a mobilizing slogan impelling changes in legal thought and institutions, today the momentum has been lost. And if the reformist impulses that marched under the access to justice banner revive, they will undoubtedly take new form and use new language. Yet the movement made a permanent mark on American legal culture. My purpose is to analyze the transformations associated with the theories, practices, and institutions associated with "access to justice."

I shall focus, however, on changes in legal theory. One could, of course, look at the institutional dimension. The movement for "access to justice" created new institutions and changed others. And these transformations set off reactions which have affected the fate of some of the initial innovations. One could tell the story of the Legal Services Corporation, created to extend legal protection to the poor and still alive after a decade of attack from the Right, albeit muzzled and somewhat dispirited. One could recount the fate of the public interest law firm. This institutional form was developed in the 1960s by liberal reformers who sought to perfect liberal legal institutions and expand the affirmative state. Such public interest law firms still exist, although probably fewer in number than in their heyday. Today the form has also been appropriated by New Right groups who employ the non-profit law firm to defend competitive capitalism and attack regulatory-welfare

institutions. Finally, any institutional account would have to chart the curious history of the alternative disputes resolution (ADR) movement. Begun as an effort to critique formal legal procedure as economically and experientially inaccessible, and as a movement for more contextual and participatory justice, ADR today has become a major industry, but one that largely serves to divert cases from an unreformed civil justice system or handle major corporate disputes. All these institutional stories are important, but they have been told elsewhere.

My purpose is different. I think that the most significant and lasting contribution that the access to justice movement had in the United States was its impact on legal theory. If we look back at the heyday of this effort (roughly the 1970s) we will see that the critiques and reform projects associated with this slogan were associated with transformations in legal theory. In a time when institutional reforms are on the wane, it is important to look at these theoretical shifts. I do not mean to suggest that the access to justice reformers and the institutions they created were the sole-or even the primary-cause of the theoretical transformations I have in mind. Many influences within and without legal culture contributed to these changes. But access to justice as a theoretical project was associated with major shifts in legal thinking. These shifts, I believe, are relatively permanent and will have important if unforeseeable impacts on legal institutions and practices in the future. My purpose is to describe them.

The two changes I will focus on can be called the redefinition of law and the reconceptualization of the self. My argument is that at two critical moments the debate about access to justice helped propel theoretical shifts in our understanding of law and in the theory of society that underlies legal thought. The result of these critical moments was to redirect legal culture. These "moments" did not lead to some new, unitary vision which all legal theorists and activists share. Rather, they changed the terms of the debate and the nature of the issues.

1. Legal Theory as an Arena of Struggle

By legal theory, I mean the argument and visions which inform doctrine and illuminate practices and institutions. "Theory," as I use it, is broader and more pervasive than "jurisprudence." It is the way we reflect on what we, as lawyers, do and explain our practices to ourselves and others. Theory is everywhere and yet it is elusive. Any account of law or legal work is a theoretical statement in this broad sense.

The relationship between legal theory and legal institutions and practices is complex. Theory and practice are loosely related. Theory neither determines practice nor practice theory. Theory is normative and descriptive. It is a way of explaining what we do and why we do it. It can operate as justification: legal theory is often a "rationalization" (in the Freudian sense) of practices in light of broadly held normative understandings. Because theory must have a normative component, it also can be a

source of critique. Thus theory can also be transformative. Since all efforts to relate practices to norms admit debate about the norms and the fit of the practices, theory can be the source and scene of transformative argument.

For these reasons, theory is an arena of struggle. In the arena of theory, broadly conceived, different normative programs and descriptive accounts contend for dominance. These contests do not lead to decisive victories or final triumphs, but they may change the terms of the debate and privilege one view over the other. In the course of theoretical struggles conceptual changes may occur which redirect debate and channel energy. Some visions may, for a time, come to prevail while others become marginalized. Because these are partial victories, and theory does not merely mirror practice, struggle in the theoretical arena matters. But because the relationships between theory and practice are loose and indeterminate, the effects of such struggle are often hard to predict.

The access to justice movement included just this sort of theoretical struggle. It contributed to changes in legal theory which in turn helped the development of institutions which reformers championed. Access to justice practitioners, publicists, and academic supporters contributed to a redefinition of society, law, and procedural justice. The paradox, however, is that these shifts did not have the simple effects the reformers sought. Rather, as legal culture has absorbed the new concepts some have found it possible to attack - or limit - the

institutional reforms the access to justice movement championed while employing the very concepts of law and society it had helped develop.

2. Starting Points: Self and Law in Civil Procedure

The moment we focus on access to justice as a theoretical movement, we have to ask: what is this theory about? The best way to situate this movement in a theoretical tradition is to see it as an effort to change the theory of civil procedure. After all, the person who did the most to stimulate theoretical work on access to justice and to popularize the movement was Europe's leading proceduralist, Mauro Cappelletti. And while the institutional reforms which the movement spawned went far beyond court reform, all, from legal services to ADR, were justified on procedural terms. It was because legal representation was essential for the operation of civil procedure that subsidized legal services for the poor seemed legitimate. It was in part because administrative agency processes were similar to judicial proceedings that representation of diffuse interests in agency hearings also made sense. And it was because there might be better ways to do some of the work of civil justice that ADR was justified. At the roots of "access" theorizing lay efforts to revise the theory of civil procedure and transform procedural institutions. To understand the critical and transformative moments in the access to justice movement, therefore, we have to examine the traditional theory of civil procedure. Moreover, in order to understand the nature of the transformations that were

effectuated, we must explore the social vision that lay behind these ideas, placing the theory of civil procedure within a vision of self and society, and relate ideas about procedure to notions of the social role of law.

Civil procedure, traditionally understood, is a mechanism for enforcing rights. Thus the theory of procedure is merely a derivative part of the theory of rights. In the liberal-individualist approach that has dominated American thought about legal procedure (and so much else), the purpose of law is to protect rights, and the purpose of rights are to empower the self.

What is the liberal vision of self and empowerment? In a sense, liberalism posits the self as empowered, and sees any changes in this concept of self as disempowering. In the liberal imagination, the subject or self is theorized as an isolated, fully constituted unit capable of choice. Each person has their own aims, interests and conceptions of the good. The task for law is not to form this self, but to ensure that the fully "formed" self is not disempowered by the actions of others or the intrusions of the state. Rights do this. Rights are specific entitlements which create a sphere of autonomous action within which the liberal self can act. In the sphere delimited by a subject's rights others are forbidden to act. Since the liberal theory of justice isolates the self from social context and relationships, it considers that protection against others is sufficient for empowerment. As long as freedom of choice is

guaranteed, the sources or content of choice is irrelevant. The freedom of a fully constituted subject to choose is the beginning and the end of empowerment. The absolute property right is the canonical form of liberal empowerment.

The liberal theory of empowerment has been criticized and modified. But it still plays a major role in our thinking about civil procedure. Procedure is what makes rights possible. Rights require effective boundaries between self and others. Since not everyone-including the state-voluntarily accepts boundaries, there must be a way to ensure that transgressions are prevented or punished. To do this, we must be sure that there is a right or prescription that establishes the boundary, and be able to say whether a given set of events constitutes a transgression. Civil procedure provides the means by which a neutral arbiter can determine if the legal order has established a particular "boundary" and if the defendant has stepped over it.

Liberal legal theory is not just individualistic: it is also egalitarian. As a result, liberal theories of civil procedure must deal with problems of the cost of civil justice. The fact that civil justice costs money, while it is seen as essential to individual fulfillment, has long troubled proceduralists. This problem explains the earliest "access to justice" reforms - legal aid.

Liberal theory suggests that if rights are protected, the legal system will provide "justice" at least in the limited sense of individual choice. But it recognizes that state power may be

needed to ensure this goal. And it cannot duck the fact that especially in systems like ours which rely on the parties to control civil litigation, state justice can only be secured by buying part of the package - lawyers - in the market. Yet not all have the resources to do this.

Legal aid seems to solve these problems. If legal aid is provided to those who can't pay, this criticism of liberal justice falls. Legal aid has proven popular because it deals with a flaw in liberal legalism that even its staunchest supporters must acknowledge. One does not have to be a critic of the liberal theory of justice to accept the need for legal aid. One does not have to question traditional notions of law, the operation of the state, or the role of lawyers. The theory of legal aid raises no challenge to liberal theory. It does not question the validity and certainty of rights. It need not suggest any "bias" in law and law enforcement against the poor, except that which results from lack of a lawyer. For these reason, while legal aid was of great institutional importance, it did not affect legal theory in a basic way. It simply reassured us that the distribution of income was not a threat to the liberal vision of self-empowerment.

3. The First Critical Moment: Expanding the Concept of Law

The first critical moment in access to justice as legal theory came when vanguard legal services lawyers and others began to sense the need for a new form of practice and thus a new theory to justify their activities. Poverty lawyers began to see

that the job of protecting clients involved more than going to court to seek traditional remedies. First, they learned that the legal system did not necessarily recognize many of the "rights" they thought necessary for their clients, and these had to be fought for. Second, they saw that the nature and meaning of such rights as did "exist" were often unclear, and protections granted on paper could easily be interpreted away or undermined by low-level bureaucratic decisions. Third, they saw that it wasn't enough to have the right argument: power relationships affected key decisions in ways not contemplated in classical legal theory. As a result of lessons learned in the war against poverty and the early years of the public interest movement, the new practitioners and theorists allied with them began to push for broader conceptions of law and a different view of law in society. Among the basic moves in legal theory that they championed were:

- fuller recognition of the indeterminacy of legal doctrine;
- greater appreciation of the centrality of bureaucratic decision-making;
- greater sensitivity to the role of power in legal outcomes.

The American theory of public interest law which emerged in the mid 1970s caught these three themes most forcefully. The argument for public interest law was developed out of a merger of

classical liberal legalism, legal realism, and interest group pluralist theory. From legal realism came the understanding that legal texts are indeterminate and legal interpretation problematic. This meant that the process of defining and applying "rights" was much more complex and problematic than liberal legalists would like to admit. This insight was combined with the recognition that bureaucratic decision-making by the agencies of the welfare-regulatory state was the modal form of law interpretation and application in the modern state, and the realization that superior organization gave substantial advantages in these crucial decisional processes. In a world of legal indeterminacy, bureaucratic dominance, and power inequality, the problem of protecting the "empowered self" seemed much more complex, even to those who fully accepted the liberal theory of justice. Individual empowerment now required collective action. Public interest lawyers would offer surrogate representation for the aggregated interests of those left out of the decisional process by barriers to organization and power disparities.

The most sophisticated theorists of the access to justice movement faced a difficult task. To make sense of their practices and justify the institutional forms they had created and wished to preserve, they had to expand the boundaries of the legal "field" by embracing practices classical theory treated as politics, not law. But at the same time they had to stress with vehemence that what they did was law. The only way to carry on politics through legal forms was to deny that the work was

politics; but in order to gain legitimacy and avoid internal dissonance the idea of law had to be politicized.

The goal that the reformers sought was ambitious. Ultimately, they wanted to legitimate their practices and justify the institutions they were creating. The most "advanced" saw the need to carry out a full range of advocacy efforts on behalf of those they sought to represent. This advocacy had to include "collective" actions, that is efforts to secure rulings, interpretations, regulations, and statutes that benefited large numbers of the groups they saw as their "clients." This collective advocacy could involve "surrogate" representation in which the public interest lawyer spoke on behalf of allegedly unorganizable interests. But it could-and sometimes did-involve direct efforts to mobilize the clientele for political action. At the most ambitious, the theoretical project of the access to justice movement sought to redefine law in terms that would include practices such as this, and redefine access to justice to include the need for all the types of advocacy they wanted to carry out.

The project was a partial success. The access to justice theorists did have an effect on legal theory. In order to justify their institutions and practices, they argued persuasively that law was more open and indeterminate than classical theory suggested, that bureaucratic processes are central to law making and application in the modern state, and that power disparities, including the ability to hire

representatives, made a difference in outcomes. And, although these propositions were not universally accepted, they have found widespread acceptance among legal thinkers in the United States. However, the acceptance of these ideas have not necessarily meant acceptance of the "access to justice" reforms. It has turned out to be quite possible for legal thinkers to more or less accept all of these positions on the nature and effect of legal processes and yet also oppose public interest law or collective action by legal services lawyers.

One can see this in the work of Richard Stewart, a leading administrative law scholar (1985). Stewart does not really challenge any of the theoretical claims that were associated with public interest law. He understands that law-making and application is an open field, that bureaucratic institutions are central, and that organization gives a power advantage. But he thinks that public interest law makes a bad situation worse, rather than providing a needed corrective. His solutions look to the radical restructuring of the way regulation is carried out, shifting from command and control systems implemented by bureaucracies to economic incentive systems that would, at least in theory, be largely self-executing. He argues that the extension of substantive and procedural rights to "unrepresented" groups and their public interest law surrogate representatives simply increases the complexity and decreases the efficiency of the regulatory process. Instead of fixing the machine, he wants a new machine altogether, one in which there would be no need for the public interest lawyer.

Another theorist who accepts some of the arguments of the access to justice theorists but rejects their call for new institutions like public interest law is Cass Sunnstein (1985). Public interest law theory can be seen as an elaboration of liberal individualism. It accepted the idea that individual interests are the sole source of normative authority, and that empowerment meant allowing individuals to protect these interests. But it saw that under modern conditions government may not work effectively to aggregate individual preferences. This "failure," in the eyes of the public interest theorists, came from obstacles to the perfect functioning of the interest group pluralist model of policy making. Interest group pluralism, which promised efficient and fair aggregation of interests through group bargaining, only worked when there were interest groups whose size and power were commensurate with the interest in question. While by and large this correspondence prevailed in America, there were gaps. These came about when an interest was under-represented by its interest group, or where there were "diffuse" interests for which no group existed. The solution was not to question the individualist basis of this theory of politics, or the interest group aggregation model, but rather to perfect the model by adding surrogate representatives for the under-represented. Once decisional processes were thus perfected, the theory of liberal justice would ensure fair results.

Sunnstein accepts the critique of pluralism that public interest advocates put forth. But instead of perfecting the

APPENDIX: SELECTED DATA
REGARDING WEST GERMAN CIVIL JUSTICE[§]

<u>Table 1: Number of Courts*</u>	
County courts	551
District courts	93 ¹
High courts (appellate courts)	20 ²
Labor law courts	96
Administrative courts	36
Social-security law courts	51
Tax law courts	14 ³

* Source: Statistisches Jahrbuch 1987 (qualifying date: January 1, 1987)

¹ with 1200 panels for civil, and 1162 for criminal cases

² with 405 panels for civil, and 72 for criminal cases

³ with 132 panels

<u>Table 2: Number of Judges</u>		
Type of court	Judges	thereof female
Constitutional courts	98	4
"Ordinary" courts	13,040	2019
Labor law courts	693	96
Administrative law courts	1,732	240
Social-security law courts	1,002	165
Tax law courts	509	19
Disciplinary courts	683	49
Totalling	17,031	2540

* Source: Statistisches Jahrbuch 1987 (qualifying date: January 1, 1985)

[§] This appendix contains more data than referred to in the paper, which may nevertheless be of interest for the discussion.

<u>Table 3a: Court Caseloads (pending cases) *</u>			
Ordinary jurisdiction	civil cases	family cases	criminal cases
county courts	1,748,830	644,276	1,873,494
district courts			
- as first instance	529,311	-	19,591
- as courts of appeal	123,614	-	78,496
high courts			
- as first instance	-	-	80
- as courts of appeal	92,086	37,384	15,137
federal court		6,500	4,325

* Source: Statistisches Jahrbuch 1987 (qualifying date: January 1, 1985)

<u>Table 3b: Court Caseloads (pending cases) *</u>	
Labor law jurisdiction	
- labor law courts	476,299
- labor law courts of first appeal	25,607
- federal labor law court (2nd appeal)	1,856

* Source: Statistisches Jahrbuch 1987 (qualifying date: January 1, 1985)

<u>Table 3c: Court Caseloads (pending cases) *</u>	
Social-security law jurisdiction	
- courts of original jurisdiction	364,246
- courts of first appeal	37,634
- (federal) court of second appeal	1,461

* Source: Statistisches Jahrbuch 1987 (qualifying date: January 1, 1985)

<u>Table 3d: Court Caseloads (pending cases) *</u>	
Administrative law jurisdiction	
- courts of orig. jurisdiction (1982)	151,221
- courts of first appeal (1982)	19,091
- (federal) court of 2nd appeal (1985)	2,001

* Source: Statistisches Jahrbuch 1987 (qualifying date: January 1, 1982 or 1985)

Table 3e: Court Caseloads (pending cases) *

Tax law jurisdiction	
- tax law courts (1982)	145,048
- federal tax court (1985)	8,144

* Source: Statistisches Jahrbuch 1987 (qualifying date: January 1, 1982 or 1985)

Table 3f: Court Caseloads (pending cases) *

Federal Constitutional Court	
- senate 1	2,616
- senate 2	2,221

* Source: Statistisches Jahrbuch 1987 (qualifying date: January 1, 1986)

Table 4: Duration of civil court procedure in courts of 1st instance (% of cases, 1984) *

Court	up to 6 months	6-12 months	12-24 months	more than 24
county	82	14	4	>1
district	70	18	9	3

* Source: Bundestags-Drucksache 10/5317

Table 5: Duration of judicial redress in civil cases (% of cases, 1984) *

Court	up to 6 months	6-12 months	12-24 months	more than 24
district	74	22	4	>1
high	41	39	17	3
federal	21	15	29	5

* Source: Bundestags-Drucksache 10/5317

<u>Table 6:</u> Duration of civil cases from filing at LG as court of 1st instance until final disposition at the BGH (% of cases, 1984)*				
	up to 2 years	2-3 years	3-4 years	more than 4
	16	39	23	22

* Source: Bundestags-Drucksache 10/5317

<u>Table 7:</u> Value at stake, 1st instance (county court)*				
D-Mark	n	%	% cum.	
- 100	48,249	4	4	
101- 200	70,614	6	10	
201- 500	193,871	16	26	
501-1,000	226,204	19	45	
1,001-1,500	134,869	11	56	
1,501-2,000	101,198	8	64	
2,001-3,000	142,393	12	76	
3,001-5,000	195,518	16	92	
5,001-	96,530	8	100	
	1,209,446	100		

* Source: Bundestags-Drucksache 10/5317

<u>Table 8:</u> Value at stake, 2nd instance (district court)*				
D-Mark	n	%	% cum.	
- 200	364	>1	>1	
201- 500	1,101	2	2	
501- 100	12,753	17	19	
1,001-1,500	13,349	18	36	
1,501-2,000	10,679	14	50	
2,001-3,000	15,449	20	71	
3,001-5,000	15,213	20	91	
5,001-	6,977	9	100	
	75,885	100		

* Source: Bundestags-Drucksache 10/5317

Table 9: Value at stake, 1st instance (district court)*

D-Mark	n	%	% cum.
1- 3,000	8,965	3	3
3,001- 5,000	17,045	5	8
5,001- 10,000	120,815	37	44
10,001- 20,000	81,739	25	69
20,001- 50,000	62,265	19	88
50,001- 100,000	22,079	7	95
100,001- 500,000	15,898	5	100
500,001-1,000,000	1,486	>1	100
1,000,001-	816	>1	100
	331,108	100	

* Source: Bundestags-Drucksache 10/5317

Table 10: Value at stake, 2nd instance (high court)*

D-Mark	n	%	% cum.
1- 3,000	3294	6	6
3,001- 4,000	3319	6	12
4,001- 8,000	11,891	22	35
8,001- 15,000	11,373	22	56
15,001- 30,000	9,678	18	75
30,001-100,000	9,079	17	92
100,001-250,000	1,600	3	100
	52,983	100	

* Source: Bundestags-Drucksache 10/5317

Table 11: Value at stake, last instance (federal court)*

D-Mark	n	%	% cum.
-40,000	486	18	18
40,001-100,000	1148	43	61
100,001-250,000	610	23	84
250,001-	406	15	100
	2650	100	

* Source: Bundestags-Drucksache 10/5317

<u>Table 12: Cases per judge (1984)*</u>		
Type of court	cases pending	cases disposed of
AG	1038	746
LG, 1st inst.	266	174
LG, 2nd inst.	275	184
OLG	121	70
BGH	69	38

* Source: Bundestags-Drucksache 10/5317

<u>Table 13: Kind of disposition of civil cases (1984)*</u>					
Court	1	2	3	4	5
county	29	26	17	9	19
distr., 1st	30	20	12	16	22
distr., 2nd	54	1	23	13	9
high	50	2	24	16	8
federal	30		21		3

- 1 Final judgment after contested process
- 2 Default judgment, acknowledgment by defendant, or waiver by plaintiff
- 3 Withdrawal
- 4 In-court settlement
- 5 Else, including decision on division of costs only because of out-of-court settlement

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Introduction

Alternatives to litigation are a rapidly expanding part of the legal scene in the United States.¹ In the last 15 years, alternative means of dispute resolution have been applied to such diverse problems as divorce, parent/child conflicts, victim/offender restitution, patent conflicts, consumer grievances, environmental conflicts, and interstate water rights disputes. The movement has acquired strong institutional bases in courts, in private practitioner organizations, and in government social services (for an overview, see Goldberg, Green, and Sander, 1985).

Advocates claim that alternatives provide a more efficient, cheaper, faster, and more effective way of dealing with conflict than litigation. Informal alternatives are widely considered more humane, responsive, and flexible than adjudication and more appropriate for ongoing relationship problems. Research shows consistently high levels of satisfaction reported by users of alternatives (Pearson, 1982; McGillis, 1986). Some research indicates that mediated settlements in small claims courts produce greater compliance than adjudicated ones (McEwen and Maiman, 1984). The same pattern is not as clear in criminal matters (McGillis, 1986: 14),

however, and it may reflect differences between those who go to mediation in comparison to those who go to court. Neil Vidmar points out that disputing parties willing to go to mediation are also those more likely to accept some responsibility for the problem (1984).

Some of the initial impetus for alternatives came from complaints about barriers to access to the law in the United States (Nader, 1980; for an overview, see Sarat, 1986). Current advocates claim that whether or not alternative dispute resolution mechanisms improve access to law, they do provide better access to a more effective form of dispute resolution (Goldberg, Green, and Sander, 1985: 6). Following Lon Fuller's notions of the suitability of adjudication, arbitration, and mediation for different kinds of problems (1963; 1971; 1979), prominent advocates such as law professors Goldberg, Green, and Sander suggest that different procedures are suited to different kinds of disputes (1985). The optimum fit between problems and processes depends on the relationship between the parties, the nature of the problem, the amount at stake, and the demands of speed and cost.

An important source of support for informal dispute resolution is judicial leaders who hope that alternatives will reduce court congestion and delay. Some blame this congestion on American litigiousness unleashed by the breakdown of community and the erosion of the authority of family, church, school and

neighborhood in American society. As former Chief Justice of the Supreme Court Warren Burger put it,

"One reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal 'entitlements.' The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity (1983: 3)."

The problems to be removed from courts are typically those judged inappropriate for adjudication: those involving ongoing relationships, those concerning social rather than legal issues, those without much at stake, and those with multiple parties and issues. For example, there are now some two hundred or more "neighborhood justice centers" associated with lower courts which handle interpersonal cases brought to these courts (Goldberg, Green, and Sander, 1985: 347; McGillis, 1986).

On the other hand, another group of advocates for ADR envision an entirely separate justice system under the control of local communities (Shonholtz, 1984; 1987). Claiming that legal intervention into the fabric of neighborhood and family life increases dependence on the law and undermines community, these community activists urge the creation of neighborhood mediation panels outside the legal system altogether. In sum, advocates

for ADR come from a wide political spectrum, ranging from those who seek to limit the supervision of the law over community life to those who hope that alternatives will increase the efficiency of courts by relieving them of the burden of interpersonal and other inappropriate cases brought by overlitigious people. ADR unites community activists with conservative legal elites (see further, Harrington, 1985).²

The lines of critique are also fairly clear by this time. From the perspective of liberal legalism, critics argue that alternatives provide second class justice and create a two-tiered legal system (Tomasic, 1982; Auerbach, 1983). The poor, minorities, women, and small businessmen are urged out of the courts rather than in, hindering rather than improving access to justice. Many worry that alternatives cannot provide fair settlements when there are power imbalances (Singer, 1979; Goldberg, Green, and Sander, 1985: 11). Some critics claim that ADR encourages people to use forums in which rights and rules are irrelevant: the only standard for settlement is mutual acceptability. Minorities argue that these procedures threaten hard-won rights better protected in legal arenas (Delgado, et. al., 1985). Feminists charge that women lose the protections of the law in situations of domestic violence, divorce, and custody arrangements. Considerable debate surrounds the question of the extent to which knowledge of rights under law should be incorporated into the mediation process. Although alternatives perform well on measures of satisfaction, critics point out that

this is not the same as measures of just outcomes (Harrington, 1985). Indeed, Susan Silbey and I have argued that the higher rates of satisfaction with alternatives can be explained by the chance to tell one's story whole rather than by any greater sense that the outcome is just (1987).

From the perspective of critical social theory, informal justice represents an extension of state power through non-state means, a widening of the judicial net so that more people are pulled under the supervision of the legal system although in an indirect and subtle way (Abel, 1982; Hofrichter, 1987). These critics point to parallels with the American Progressive Era in the early 20th century in which similar informal justice reforms were promoted in the criminal law as ways of providing individualized treatment, greater efficiency, improved classification of problems, and informal, non-adversarial treatment (Harrington, 1985; Rothman, 1980). Because these progressive reforms, such as probation, parole, indeterminate sentencing, and juvenile courts, were presented within an ethic of treatment and cure rather than punishment, the tendency to impose "treatments" which were more like penalties without regard for guilt or innocence or without benefit of legal protections seemed unimportant. If people were being helped, it did not make so much difference whether or not they really deserved that help. The achievements of the progressives came under attack during the rights-conscious era of the 1960s for denying rights while expanding state supervision of behavior.

Thus, current debates replicate aspects of debates over these earlier informal reforms.³

In assessing these claims and critiques, I think it is essential to disentangle the very different processes which are lumped together as alternative dispute resolution. Some ADR processes operate at the top of the market, others at the bottom. Some provide an alternative to expensive litigation for financially well-endowed actors such as large businesses, government and public-interest groups, and wealthy divorcing spouses, while others provide an alternative to free or low-cost judicial services such as small claims court, criminal court, or juvenile court. These are services used by the working poor, who cannot afford lawyers. In the first case, clients pay for a dispute resolution service which they hope will be less expensive and time consuming than the alternative. They choose to move out of the legal arena, knowing that if this procedure does not work, they can go back. In the second case, parties are encouraged or required to leave the legal arena because their problems are defined as undesirable and inappropriate for the courts. These are people who use the legal system with little or no help from private lawyers, relying on prosecutors and court-appointed defense attorneys. In contrast, the first group employs expensive legal help. It is the second group of users who are accused of overly litigious behavior and of clogging the courts, not the first.

Many of the critiques of ADR apply only to its application to the second category of disputants, who are typically more vulnerable, poorer and more often women (Singer, 1979; Tomasic, 1982; Auerbach, 1983; Nader, 1984). ADR also seems least popular among these users, who are being encouraged and increasingly, required, to use informal dispute resolution rather than court services despite indications of resistance. On the other hand, much of the successful growth and application of ADR has been among the first category of disputants, who are choosing to replace expensive and slow legal services with less expensive and faster mediation or arbitration services. Disputants at the low end of the market are more often denied the choice of formal or informal processes than those at the top. In recent proposals for mandatory mediation and the multi-door courthouse, experts or legislators decide for the parties which process is most appropriate for their dispute (Goldberg, Green, and Sander, 1985: 514-516). It is these users of the lower courts, however, who constitute the bulk of people who actually encounter the courts and make up the predominant group of citizens whose ideas about the legitimacy of the legal system are tested against their experiences with court or alternatives.

Thus, the ADR field draws together similar procedures embedded in very different institutional frameworks. Some alternative dispute resolution serves affluent people who choose a different process and pay for it and some serves poor people are told to try a more conciliatory process before they can go to

court. ADR in the first setting does not diminish access to justice; ADR in the second often does. By joining together these processes despite their distinct institutional frameworks, however, these critical differences are blurred and the ADR movement becomes a powerful coalition.

Comparing Forms of Mediation

This paper compares two forms of mediation which vary greatly in institutional framework. One is court-affiliated mediation for interpersonal disputes of the neighborhood justice center type, the other is the mini-trial, a form of mediation used in commercial disputes between large corporations. The essence of the process in both is the same: a third party helps the disputing parties forge a mutually acceptable solution but has no power to impose a decision. In practice, however, mediation in these two settings is enormously different.

Court mediation is designed to handle interpersonal cases which citizens bring to the lower courts. Susan Silbey and I studied a court mediation program attached to a lower court in Massachusetts between 1981 and 1984 (see further, Silbey and Merry, 1986; Silbey and Merry, 1987). This program handles disputes between neighbors, spouses, lovers, friends and former friends, landlords and tenants, and merchants and customers. It

takes referrals from the clerk's office, the prosecutor's office, and the bench. 4

Ordinary people bring their personal problems to court and are referred, usually by the clerk of courts, to a small office in the basement of the courthouse. Here, a sympathetic young woman with no professional education asks them to explain the problem and fills out a form. The initial intake interview takes about ten or fifteen minutes. The staff person then schedules a mediation session in one or two weeks on a Wednesday evening or Saturday morning in the spare rooms of a nearby church. The parties choose the time slot they prefer. They usually have no further contact with the mediation program until the session.

At the session, the parties spend between one and three hours telling their stories to two mediators, local people with 40 hours of training in mediation techniques. Usually a man and a woman work together as a team. Each mediator receives a stipend of about \$15 per session, although all conceptualize their efforts as volunteer service. Even when the program, operating on slender and uncertain funding, runs short of money to pay stipends, the mediators continue to work. Most mediate two or three times a month. A few of the mediators have professional backgrounds, but most are people with some college training who hold responsible jobs such as high school teachers, police officers, union representatives, or guidance counselors. A few are retired. During mediation, the parties sit around

tables in children's classrooms, in large assembly rooms, or in church parlors. Agreements are handwritten on court stationary and signed by the parties at the end of the session. The program staff makes a follow-up phone call to see if the agreement is working a few weeks after the session.

The people served by the program are typically working class and poor. Somewhat over half are women. Many are at home, either temporarily unemployed, retired, or part-time workers. Those with jobs tend to do manual or clerical work. People who bring neighborhood complaints are often homeowners and in their 30s or 40s; those who file charges in boyfriend/girlfriend or marital fights are typically renters, women, and people in their teens and twenties.

At the other end of the mediation hierarchy is the mini-trial, a procedure used for cases which have become deeply embroiled in expensive litigation for which the parties wish to find a quick settlement (Green, 1982). The mini-trial is recommended for complex questions of mixed law and fact such as patents, products liability, contract, antitrust, and unfair competition cases (Green, 1982: 19). Although the procedure is mediation as I have defined it, it is not called mediation. "Mini-trial" is a misnomer created by a journalist, but its proponents describe the process as a "highly structured settlement process," a "non-binding, confidential procedure ... structured to reconvert a legal dispute back into a business problem" rather than as mediation, apparently to make it more

attractive to clients (Henry, 1985: 13, 14). Clients at a mini-trial are typically large corporations and their attorneys.

The first mini-trial was held in 1977. By 1985, the Center for Public Resources, an organization providing mini-trials as well as other forms of alternative dispute resolution, included over one hundred general counsel of Fortune 500 corporations, fifty leading practitioners from major law firms, and prominent legal academics. It touted a string of successful cases including a multimillion dollar contract dispute between Wisconsin Electric Power and American Can Company and a highly technical controversy concerning performance standards of a NASA satellite system built by TRW for Spacecom (Henry, 1985: 13-14). The Center for Public Resources has brought together a group of eminent, experienced lawyers and former judges to serve on a Judicial Panel to assist parties in developing private procedures and serve as neutral advisors (Henry, 1985: 15).⁵ My description relies on accounts provided by the proponents of the mini-trial, including brief summaries of cases (Green, 1982; Goldberg, Green, and Sander, 1985: 271-280; Henry, 1985).⁶

A mini-trial is usually managed by a neutral advisor, a kind of mediator, who is chosen by both sides. Neutral advisors are typically retired federal court judges, law professors, or technical experts, persons of stature respected by both sides. They almost always have legal training. All the clients have legal representatives present at the mini-trial. In a handbook describing several mini-trials in some detail, all the neutral

advisors were men, as were all the clients (Green, 1982). Sometimes the neutral advisor simply presides over the session, sometimes he offers an advisory opinion, and occasionally he arbitrates if the parties request it. The parties themselves construct the rules of procedure, determine the role of the neutral advisor, and decide on the time constraints for their presentations and the evidence they will consider. Key documents and testimony from expert witnesses are presented informally, but rules of evidence do not apply.

After several weeks of preparation, the parties meet for one to four days (two is average) during which the attorneys for each side present a brief version of their case. Together they choose the time, somewhere between one and six hours per side. There is opportunity for rebuttal in most mini-trials. In one case, each side had one and a half hours to present its case, then after a break, each side had a half hour to ask questions and ten or fifteen minutes for closing remarks. After the presentations of cases, the executives meet privately without their attorneys to negotiate. Sometimes the neutral shuttles back and forth between the parties as they negotiate; sometimes the executives talk by themselves. Frequently they come up with their own agreement. The neutral advisor has no authority to make a binding decision, but usually provides his assessment of the strengths and weaknesses of their respective cases. He may give his opinion of the range of risk or the possibilities of the court settlement. If they reach an agreement, he will write up a

draft of the settlement which is binding on the parties.⁷

Parties may terminate the mini-trial at any time. If the case does not settle, the parties are free to return to court, but most mini-trial agreements specify that statements made in the process and the opinion of the neutral advisor are inadmissible in any subsequent court proceeding. The cost of the mini-trial is considerably less than that of full-scale litigation, but the clients typically pay several thousand dollars or more for their preparation costs and for the neutral advisor's time.

Silent Signals

Although both are mediation, the mini-trial is very different in practice from the court mediation session. One can think of mediation as a performance in which the lines are provided but the staging, the lighting, the costumes, the nuances of speaking and acting are all variable. Shakespeare in the high school gym is a different performance from a production in a London theater. As John Conley and William O'Barr show in their study of small claims court judges, the same procedures can produce very different performances (1988). Some of the judges they observed behaved in an authoritarian way, others portrayed themselves as relatively helpless to counter the rules of the law which they were required to enforce, and others tried to mediate

the cases before them. The judges differed in how they presented themselves, considered evidence, made pronouncements, and justified their decisions.

The content of the performance is shaped by silent signals of time, space, dress, and language. Silent signals are symbolic forms which convey unspoken messages about the importance and meaning of an event, messages which are neither directly given nor consciously received.⁸ These silent signals are powerful precisely because they are rarely recognized or acknowledged. To illustrate silent signals, I will turn to a remote example: court reform in Papua New Guinea. In 1973, the government of Papua New Guinea created a new set of village courts intended as informal, conciliatory alternatives to the state courts (Westermarck, 1986). But the court Westermarck studied replicated the state courts in architecture and furniture. Instead of holding hearings outside or under thatched roofs in front of judges wearing traditional dress, the magistrates of the new courts located themselves within a building whose entrance path was neatly lined with stones. Inside, tables, chairs, handbooks, badges, and the national flag proclaimed the forum a formal government one. The magistrates even requested uniforms and handcuffs. In this statement by a magistrate to a disputant, the symbols of book and building illustrate vividly the new court's official links to the government:

"If you stayed in the village with this case, then you could just follow the way of our ancestors. But the way of the court is for us to hold the book and sit down at the table. You have come inside and so we hear your case according to the new way, the way of the whiteman (1986: 137)."

Indeed, in the opinion of the villagers, these courts dispensed government law.

One of the most powerful of these silent signals is time. Some mediation, as we have seen, is brief and completed in a single sitting, while other mediation takes as long as is necessary to reach an agreement. In the community mediation program, mediators hoped to settle cases quickly. The entire session generally lasted between one and three hours and produced an agreement in a single session. Mediators sometimes talked about scheduling a second session, but these rarely came about. They assumed that their objective was to settle the case the same night. Mini-trial presentations are generally restricted to only a few days by mutual agreement, but are generally preceded by several weeks of preparations and case building (Green, 1982). The length of time each side may take to present its case is agreed upon by the parties themselves. Informal discussions continue as long as necessary, late into the night or into the next day. Thus, in court mediation, mediators press to settle

quickly while in the mini-trial the process is far longer and is allowed to continue until a resolution emerges.

Other forms of mediation developed to handle conflicts between relatively affluent parties such as nation-states or government, private industry, and public-interest groups in environmental disputes (see further, Princen, 1987; Carpenter and Kennedy, 1985; 1988) may go on even longer. International mediations can last for years. For example, Thomas Princen describes an international mediation conducted by the Vatican between Argentina and Chile which lasted six years (1987). Susan Carpenter and W.J.D. Kennedy find that mediating environmental conflicts may take from a few days to several years (1985). Preparation for mediation in environmental and international cases often lasts several months or more as well.

A second difference in the use of time concerns the choice between work and non-work time. Community mediation programs typically use non-work time on evenings and weekends, while the mini-trial is held during work hours, although it may stretch into the night. The silent signal of time says that the mini-trial is important and worth spending valuable time, as much as is necessary, while community mediation requires only non-work time and that in short pieces. Community mediation conveys the message to parties that the problem is not important, that it should be settled expeditiously and during recreational time, while the use of time in the mini-trial suggests that the problem

is very important and worthy of extended time, although because time is valuable, both parties agree to limit its expenditure.

Community mediation takes place in extra spaces in the courthouse and in churches when they are not being used for religious purposes. The fact that the program office was situated in the courthouse conveyed to parties that mediation was part of the court. Indeed, most thought that mediation was somehow a part of the court process. Community mediation takes place around a plain table, with the two mediators facing the parties seated in wooden chairs on the other side of the table. They have only lined yellow pads for taking notes. Community mediators wear simple clothes, usually a dress or a casual shirt and pants. Parties are similarly casually dressed. The talk is of morality and help. Although the parties raise their rights and demands for protection, mediators encourage them to think in terms of relationships and compromise.

Mini-trials, on the other hand, take place in neutral but comfortable locations: conference rooms in non-involved law firms, in the neutral advisor's law firm, in the local bar association, or in a hotel. This is a very private space, and the complete privacy of the proceedings is strongly emphasized. Evidence is wheeled in in carts, often consisting of six to eight feet of bound documents. The procedure looks like a legal proceeding of the type that would take place in a judge's chambers. Parties bring their supporting staffs of junior attorneys. Attorneys and the neutral advisor wear formal attire,

generally suits. The language is legal, referring to the admissability of evidence, the applicability of federal rules of evidence, and technical questions. In sum, in multiple ways the silent signals of community mediation say that it is not important, that it is to be quick and conducted at the margins of everyday life, while those of the mini-trial communicate that it is important, worthy of work time and private but official quarters. The language of community mediation is that of morality and help; that of the mini-trial is the language of law.

Choice and Access

These two forms of mediation also differ greatly in the extent of choice they incorporate. In the court mediation program, clients are informed that they have a choice about whether or not to go to mediation. Yet, when Silbey and I interviewed 68 people who had gone to mediation, half said that they had had no choice about whether or not to go to mediation, although for a few this was because the conflict was intolerable, not because the court required them to use mediation. Most of the people we interviewed were confused about whether mediation was part of the court process or not. Some said that they were trying to impress the judge with their willingness to try to compromise. A few asserted that they had been to court when they had actually attended a mediation session. The letter of

invitation to use mediation is on court stationary signed by a court official and the office of the mediation program was in the courthouse. In terms of the silent signals of space and symbolic form, mediation is indeed defined as part of the court.

Once the parties agreed to try mediation, they are given a choice of times for the session. The program staff assign two mediators from the roster of trained mediators. At the mediation session itself, the mediators introduce themselves to the parties without asking the parties if they find them acceptable. Then they announce the rules and procedures of the session, again not asking the parties if they agree. They describe the sequence of public and private sessions, the rules of note-taking, the prohibition against interruptions, standards of confidentiality, and the objective of coming to a mutually acceptable agreement. They present themselves as trained and sometimes as authorized by the court, saying that they have taken an "oath of confidentiality" from the judge (see further on presentation of self and other mediation strategies, Silbey and Merry, 1986). The mediators tell the parties nothing about how long the process will last, although they do have some idea based on their own experience and expectations. The mediators retain control over timing by asking questions, stopping long-winded parties who wander off the subject, controlling and blocking fights, calling breaks to the public and private sessions, and preparing and presenting the final agreement.

Parties retain choice over the outcome of the process, although the specific language of the agreement is constructed by the mediators. After each side presents its position, the mediators propose language which appears to satisfy both sides, sometimes couched in vague promises of improved behavior in order to gain the support of both. For example, agreements contain statements such as, "George and Elizabeth will treat one another with respect, will go out to dinner together every Tuesday night, and will discuss together ways of disciplining the children." The mediators write the agreement by hand on a form with a court letterhead while the parties are out of the room, then invite them to return to sign it, with the mediators signing as "witnesses". Although the mediators provide the phrases and language of the agreement, agreements generally address the issues raised by the parties. ⁹

In sum, the parties in the court mediation program sometimes choose to go to mediation and choose the outcome, but they have no choice about the mediator or about the procedure. Even the choice to go to mediation is constrained by their confusion about the nature of the court process and the extent to which mediation is voluntary; half thought they had no choice. Further, their choice of outcome is also constrained by the role the mediators play in forging the language of the agreement. For many of the clients of this mediation program, mediation is a hurdle in the path to the judge.

The dimensions of choice in the mini-trial are far greater. The parties must first agree to try a mini-trial rather than litigation. As Green points out, once they are deeply into litigation and see the costs stretching into the future, the time is ripe for a mini-trial (1982). They are assured that withdrawal is possible for either side at any time, however, and both are clear that they can move on to trial if the mini-trial fails. If both parties wish to try the mini-trial, they then must agree on rules of procedure. As case descriptions indicate, parties differ in the role they wish the neutral advisor to play, in the length of time they give one another to present their cases, on the way evidence will be considered, and in the participants who will be part of the process (1982). They must together choose the neutral advisor, who is selected from lists of names provided by both sides. In the cases described, the neutral advisors were all prominent judges and law professors with substantial reputations outside the dispute and with no vested interest. The parties then spend several weeks preparing their cases. After their presentations and informal opportunities for questioning and discussion, the top executives meet privately, without their lawyers, to see if they can work out an agreement. The lawyers have participated fully in the creation of the process and the presentation of cases up to this point, however. In most of the cases described, the neutral advisor issued only an advisory opinion or supervised the creation of an agreement, although in a few cases the parties

invited him to submit an opinion. In sum, the dimensions of choice are far greater here: the parties choose to mediate, they choose the procedure, they choose the mediator, and they choose the outcome. The timing and the location are up to them as well. The process is couched in legal language and all the participants have legal training except for the top executives, who have legal representatives. All the participants are affluent, elite individuals. Just as in the court mediation program, the social status of the neutral advisor is somewhat above that of the parties, but the differences in both cases are subtle.

Both international mediation and environmental mediation seem to have similar qualities of access and choice. In environmental mediation, the parties determine how long the process will last, where they will meet, who will chair or facilitate the process, and what procedures they will adopt (Carpenter and Kennedy, 1985). In the Beagle Channel case, the contesting countries invited the Pope to intervene (Princen, 1987). When the mediation began, the parties were on the brink of war. The case had already gone through arbitration by International Court jurists and over ten years of negotiation. The mediation sessions took place in the Vatican, to a large extent, supervised by Cardinal Samore. The Pope's intervention was couched in religious language and legitimated by his spiritual sovereignty over the peoples of both nations.

A Theory of Replication

How can we explain these differences in mediation performances? Obviously, one of the major differences between the court mediation program and the mini-trial is that one is paid for by the government and the other by client fees. They replace different services and are framed in different institutional contexts. Court mediation replaces a public service which is made available to all citizens but which is used primarily by working class and poor people, the people who tend to bring interpersonal disputes to court (Merry, 1987). Both court mediation and court processing of interpersonal conflicts share the qualities of rushed service, congestion, and spare facilities characteristic of public agencies which serve working-class clients. Treatment of interpersonal cases in court tends to be hurried, desultory, and carried out in hallways rather than in courtrooms. The plaintiff has little choice about time, place, procedure, who handles the problem, or outcome. He has none unless there is plea bargaining, and even then the plaintiff has little say (see Silbey and Merry, 1987).

Mini-trials, on the other hand, are situated in plush settings with as much time allocated as the parties can afford. The language, the dress, the modes of presentation of cases and arguments are informal but part of the culture of the law firm. There is talk of federal rules of evidence, of expert witnesses, of the possibilities of litigation. The range of choice allowed

the clients in the mini-trial is far greater than that allowed clients in the court mediation program, but large businesses or affluent private parties also have far more choice in civil courts than do working-class parties in criminal court.

I argue that both processes are shaped by the institutional framework surrounding them and the services they replace. The symbols, forms, and language of one system permeate and shape the new system. Part of the variation in the performance of mediation depends on the way the system it is replacing penetrates and reshapes the new alternative. The mini-trial looks like a pre-trial negotiation among corporation lawyers while court mediation resembles lower court case handling. Mediators in community programs are like the magistrates, prosecutors, and judges of the lower courts in social status; neutral advisors are often the same people these clients would encounter in court.¹⁰ Mediators speak the language of help and therapy, as attorneys and magistrates do in the lower courts (Feeley, 1979; Yngvesson 1985; 1988) while mini-trial neutral experts as well as their clients talk in the language of law.

Is there nothing new in these processes? I argue that there is, but that the innovation is subtle. Although each process replicates significant features of the symbolic meaning, constituency, and access to justice of the processes to which it is an alternative, each also brings new features. Over time, the surrounding system penetrates and shapes the new form to be

more like itself, as Auerbach has described in his history of informal reforms in the United States (1983). But there still remains an element of novelty, a legacy of changed process and form which resists this transformation. Historically, informal reforms have gradually become legalized and more like the formal systems they have replaced, but even so, the new initiatives for informalism initiated early in the twentieth century have contributed to the gradual reshaping of American legal institutions. What is new, however, may not be the same as the improvements that the advocates claim. One change, for example, may be a redefinition of the law itself.

Redefining the Law

The creation and justification of an alternative redefines the parent structure as well. As advocates describe the kinds of disputes appropriate for alternatives, they implicitly redefine the court. Mediation as a process is typically defined by its opposition to legal modes of resolving disputes. It is formal rather than informal, cooperative rather than adversarial, accessible rather than remote, fast rather than slow, efficient and cost-effective rather than cumbersome and expensive. Outcomes are compromise-oriented rather than win-lose. It deals with people who have ongoing relationships, not those who are involved in impersonal transactions. The problems

are primarily social rather than legal in substance, concerned with social interactions rather than property, and minor rather than major. Mediation appeals to the ideology of community, of reconciliation, of restoring relationships rather than exchanging goods, of compromise and giving in rather than self assertion. Ideologically, mediation is opposed to law: to adversarialness, to win-lose outcomes, to the idea that contests between individuals on the basis of rights resolve problems. It does not concern itself with rights, only with getting along.

Although such opposition does not appear in practice (eg., Abel, 1982; Harrington 1985; Silbey and Merry, 1987), the ideology of opposition not only defines mediation, but redefines the courts as well: it specifies by implication the task of the courts, the way they should function, and the kinds of problems which are worthy of their intervention. Mediation is an anti-structure to existing structures. Consequently, it legitimates and justifies a definition of the structure as well as the anti-structure. The ideology of the anti-structure reinforces and strengthens the central structure. By articulating what mediation does better, it defines what is appropriate and worthy of the dominant structure. The courts are not for relationships, for reconciliation, or for community since these are the arenas for mediation. The legally worthy case is one of property, not relationships, of big stakes rather than small ones.

Thus, delineating what problems law cannot handle redefines what law can handle. By arguing that alternatives are

appropriate for ongoing relationship problems or for those with low stakes, advocates define the courts as suited only for cases involving people who have no personal relationship or those in which stakes are substantial. By portraying court congestion as the product of the breakdown of community, reformers focus on interpersonal cases as those which burden the system, despite the fact that there is no evidence that the lower courts, which handle the vast majority of these cases, are overburdened or that it is this kind of case which is causing congestion and delay (on this debate, see Galanter, 1983; 1986). Indeed, some argue that the major congestion appears in the federal and appellate courts and involves largely tort cases, particularly product liability cases, along with social security claims (Lieberman, 1981; Galanter, 1983; 1986; Roper, 1986). Major corporate legal battles consume a disproportionate amount of court time, yet are not singled out as bringing "inappropriate" problems to the courts. It is more often the problems of women and families which are viewed as legally unentitled than those of men.

Access to Justice

The mini-trial does not raise the same kinds of justice questions and access concerns that court mediation does. It does, of course, raise other concerns such as secret trials shielded from public scrutiny and the emergence of a separate

system of private justice outside the public court system for those who can afford to pay. ¹¹ But, providing an alternative service to the legally represented rich does not have the same implications as requiring an alternative service for the poor who have come to see themselves as endowed with legal entitlements which they hope the courts will respect and enforce. Access to justice is a struggle for these working-class court users, recently won and contested, while it is not for the corporate executives who use the mini-trial. The mini-trial offers another choice to actors who already have considerable latitude in choosing how to handle their disputes.

Since each process replicates in significant ways the process it replaces, the new procedures may shift the way problems are handled but are unlikely to shift access to justice. That too is replicated in the new process. The access to the new process is about the same as the access to the old. Both procedures satisfy the conservative agenda of relieving the burdens on the courts and saving government expenditures, but the problems with the old system which are rooted in differences in power and class are replicated in the new. Community mediation seems to reduce citizen access to justice while the mini-trial does not. Blending all the ADR processes together for purposes of advocacy or critique blurs these critical differences.

NOTES

1. I am grateful to Lavinia Hall and Deborah Kolb for insightful comments during the preparation of this paper. The research described in the paper was supported by the National Science Foundation, Law and Social Sciences Program, in grants #SES 86-06023 and #SES 80-12034.

2. This multivocality of informal justice advocates is not unusual. Informal judicial reforms in other countries also share this tendency to join together quite disparate and often somewhat contradictory goals. In reforms in Third World countries, for example, some proponents see informal village justice as improving the legal system, others as reviving traditional customs, and others as modernizing the social order of villages and urban neighborhoods. In India, for example, nyaya panchayats were promoted as an arm of the state judicial service to carry state power and a constitutionalist vision of India into the rural areas, as a branch of the community development program to assist in the reformation of rural society by providing experience and skills in handling village affairs and increasing the participation of those reticent in village affairs, and finally, as informal, accessible panchayats (councils) which retain the traits of the traditional panchayats (Meschievitz and Galanter, 1982). It is not surprising that a judicial reform which is expected simultaneously to expand state authority, transform rural society, and revive traditional customs would have produced some ideological confusion (1982:56). Meschievitz and Galanter explain the curious persistence of this reform, despite dwindling caseloads, by a "panchayat ideology" of scholars and policy-makers who refuse to give up the idea.

Moreover, during periods of upheaval and revolution in Cuba, Chile, the Soviet Union, and China popular justice appeared to the leaders to be a way of reshaping society according to a new, revolutionary vision (Spence, 1978; Salas, 1983). Spence describes a 1971 proposal to establish neighborhood courts promoted by Allende's recently elected party, designed to establish a nationwide system of elected, neighborhood, lay-staffed courts, framed in the critique that the poor had no access to the existing legal system and that the professional judiciary was part of the legal order that discriminated against the poor (1978:143). The opposition fought the bill, proposing instead that regular judges hold court sessions without lawyers in poor and working class neighborhoods for family, neighbor, and property conflicts. In Cuba, Castro introduced popular tribunals in 1962 as a teaching tool and as a way to incorporate rural people into the revolutionary new society (Salas, 1983). At first, popular tribunals had lay judges, public discussion and critique of offenders, and great discretion for judges. By 1977,

however, as revolutionary fervor was replaced by a concern with planning and order, popular tribunals in the old mould disappeared, replaced by more sedate, professionalize, bureaucratized, and formalized courts holding hearings in courtrooms rather than in the streets and supervised by judges judicial robes, not workclothes (Salas, 1983:596, 610).

3. For a broad analysis of these trends in reform and critique, see Trubek and Esser, (1988) forthcoming. On the history of informalism and reform, see Auerbach, 1983 and Nader, 1984.

4. This research studied included observing over 150 mediation sessions in three mediation programs, interviewing people after they had been through mediation, of whom 68 had gone through the court mediation program, following cases which returned to court, and spending several months observing the operation of the mediation program and the lower court. In addition, we observed disputing in the neighborhoods and carried out a survey of the kinds of problems people experience in neighborhoods (see Merry and Silbey, 1984).

5. Panel members include Elliot Richardson, Lloyd Cutler, Shirley Hufstedler, and Irving Younger (Henry, 1985: 15).

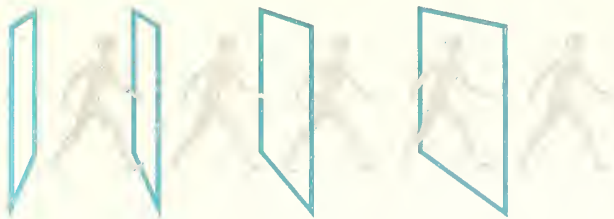
6. Discussions with Lavinia Hall who is beginning to both study and work on mini-trials were very helpful. Nevertheless, my account of the mini-trial is far less complete than that of the court mediation program.

7. I am grateful to Lavinia Hall for some of the detailed description of this process.

8. For a further development of this argument, see Comaroff, 1985.

9. In a study of another mediation program which handled parent/child conflicts, we found that about half of the particular terms of the agreement were proposed by the mediators although four-fifths of the parents and nine-tenths of the children thought that they had come up with the agreement themselves. The agreements tended to focus on the issues and problems raised by the parents and children, but the specific terms of agreement and the solutions were proposed by the mediators (Merry and Rocheleau, 1985). In other words, the family members typically define the problems and the mediators sometimes propose the solutions.

10. The program Silbey and I studied pulled in a large number of dedicated and concerned individuals who were willing to donate their time and services without pay. However, as these programs become more closely absorbed in the judicial or social services system, there are indications that they will change. In one program, the social services department required documentation



Conference
on Access to
Civil Justice

Congrès sur
l'accès à la
justice civile

THE COST OF JUSTICE: MAKING THE SCALES BALANCE

**A PAPER PREPARED FOR THE
CONFERENCE ON ACCESS TO CIVIL JUSTICE**

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EXECUTIVE SUMMARY

THE COST OF JUSTICE: MAKING THE SCALES BALANCE

R.G. takes it as a given that the civil justice system is inaccessible to the vast majority of Canadians. The challenge, therefore, is to decide how, in a society with an uneven distribution of wealth and power, this situation can be remedied. Recognizing the need for a genuine government commitment and the involvement of all members of the community, he reminds us that the justice system exists for the benefit of the public and not lawyers.

He emphasizes that the difficulty is not simply with those rules that address directly the question of costs, but with the whole structure and mind-set of the overall justice system. There must be greater funding to advocacy groups as well as to individual litigants on a case-by-case basis, a broadening of the availability of legal resources, the development of dispute-resolution processes that do not require lawyers, the encouragement of paralegals, the increased use of contingency fees, and a revamping of the criteria for awarding costs. He concludes by urging the legal profession to undertake more pro bono work.

As a 19th century jurist graphically put it, "Justice is open to all - like the Ritz Hotel".¹ This was - and is - a very apt metaphor. The justice system, particularly the civil justice system, like the Ritz Hotel is indeed accessible but only to those who can afford to pay. Almost a century after those words were first uttered, we are still struggling with the challenge of making our civil justice system accessible.

That the expenses of litigation make our justice system inaccessible to the vast majority of Canadians is a given. The costs of participating in the justice system, whether they be court fees, lawyers' fees, witness fees, jury fees, court ordered costs, costs of enforcing judgments, or other direct and indirect costs make it virtually impossible for the average Canadian to use the court process to address a wrong, or indeed to defend a claim. The point of debate is whether we can make the justice system more accessible and if so how?

Years of tinkering with the civil justice system - streamlining rules, adding judges, establishing legal aid programs - have not resolved the basic dilemma - how can we provide a rational, effective, and efficient civil justice system which is accessible to all citizens? Can we, and should we, endeavour to renovate the Ritz Hotel and lower

its rates to make it accessible to all or should we instead concentrate on developing a new chain of hotels? I believe we must do both.

It is possible to develop a civil justice system which is more accessible, more effective, and more responsive to the requirements, not only of individual litigants, but of society as a whole. But the commitment must be there - from the legal profession, the administrators of the system, from the litigants - but most of all from our governments and legislators who, in the final analysis, have the power and resources to effect the necessary changes.

Before turning to the specific issue of the costs of the justice system, how they affect access to the system and how the scales can be balanced, there are some fundamental issues which must be addressed. The first is who should be involved in developing an appropriate civil justice system.

Virtually all of the speakers at this Conference are lawyers. While it is encouraging to see leaders of the legal profession addressing the issue of access to civil justice, it is disappointing that there are not more representatives of the "user community" addressing these issues at this conference. Representatives of client groups

would have much to add to these deliberations. If we as lawyers are seriously interested in determining how we can make access to the legal system or the "justice system" available to those now cut off from that access, it is imperative that we consult with that community and truly listen to its opinions and recommendations.

Let me give you another example of how the legal community has, with the best of intentions, excluded the average citizen from important deliberations on access issues. In British Columbia, the Attorney General recently established a Justice Reform Committee with the stated goal of causing the justice system of the province "to be accessible, understandable, relevant, and efficient to all those it seeks to serve".² The Committee was directed to investigate "the attitudes of citizens towards the justice system and address any dissatisfactions which may be felt on account of the system being too complicated, too costly, or too slow."³

However, the terms of reference of the Committee (presumably drafted by lawyers) were very technical and worded in classic legalese. They were virtually incomprehensible to non-lawyers. No financial provision was made to assist citizens or citizens' groups to appear before the Committee. Combined with the historical fact of the government having effectively ignored a 1984 report of a

government task force on legal aid,⁴ this failure made it unlikely that citizens or community groups would have felt able, encouraged or compelled to participate in this consultation on access.

Fortunately, a non-government body, the Law Foundation of British Columbia, approved a grant of \$25,000 (the same amount as it provided to the B.C. Branch of the Canadian Bar Association) to assist its funded agencies and community groups to prepare briefs and make representations to the Committee. The Law Foundation, together with the Legal Services Society, also developed a kit for community groups which explained the purpose of the Committee, stated its terms of reference in plain English and suggested guidelines for the preparation of briefs. As a result, the Committee has received extensive representations from community groups throughout the province. Without the intervention of the Law Foundation, it is likely that the Committee would have heard primarily, if not exclusively, from the legal profession, an unacceptable state of affairs given the Committee's express mandate.

This would not have been the fault of the Committee but of the government that established the Committee and authorized its terms of reference without

ensuring that those most affected by its recommendations would, and could, effectively participate in its deliberations.

As lawyers, we should not have to remind ourselves that we represent clients and it is their interests, not ours, which have priority. In our attempt to develop a more accessible civil justice system it must be the interests of those who are presently denied access which dictate the framework of that system.

I agree with Mr. Justice Zuber when he says in his Report of the Ontario Courts Inquiry,⁵

"It is the opinion of this Inquiry that the principle that the courts exist for the benefit of litigants and the public is one which must be kept in mind whenever reform or restructuring of the courts is under consideration....This Inquiry would go a step further and state emphatically that not only counsel should be cast in a social service role, but that the entire court system has a purpose only to the extent it serves the community."

The civil justice system does not respond to the needs of the average Canadian. It especially does not respond to the needs of low-income and disadvantaged Canadians. As Stephen Wexler put it in his classic article, "Practicing Law for Poor People", the poor are "not just like rich people without money. Poor people do not have legal problems like those of private plaintiffs and defendants in law school casebooks."⁶ The situation of the

poor has certainly not improved since Wexler wrote those words in 1979. In fact, it has worsened. To the low-income Canadian who is disabled, elderly, lives in a non-urban area, or who does not fully comprehend the English language, the civil justice system is very remote and very unresponsive.

Essentially, only governments, corporations, and the significantly wealthy have guaranteed access to our superior courts. Lawyers' fees, disbursements (court costs, witness fees, jury fees, and other disbursements), and the potential liability of court ordered costs discourage or deter all but the most courageous of other litigants. Legal aid, contingency fees, public interest advocates, and limited government Charter funding programs, such as those discussed below, provide a very limited exception to the general rule that civil courts are inaccessible to average Canadians.

Legal rights of minorities, the disabled, women, seniors, native people, and social assistance recipients are unaddressed simply because they have no means to access the civil justice system. The social alienation and political disaffection caused by this inaccessibility are very real costs to Canadian society.

Under the heading "Courts are a Necessary Part of Society", Mr. Justice Zuber's Report stresses the essential role of the justice system. "Courts grew out of the necessity for society to provide a way of resolving disputes which did not threaten the fabric of society. The courts continue to exist because, despite their problems, the people have confidence in the integrity and wisdom of the courts, and they continue, in times of stress, to turn to the courts for the vindication of their rights."⁷ If citizens cease to have respect for, or faith in the civil justice system as a settler of disputes and a regulator of social relationships because they are denied access to that system, the system is truly in trouble.

A second fundamental issue: what exactly are we attempting to achieve by the civil justice cost allocation system? What disputes between individuals, what disputes between individuals and the state, what social issues do we believe can only be or should only be, dealt with by the courts, and in particular the superior courts? What disputes are more appropriately dealt with by other dispute resolution mechanisms - different adjudicative bodies, arbitration, mediation, conciliation? While many of these issues will be covered in greater detail in other papers and by other panelists, they cannot be ignored in considering of the costs of justice.

The superior court system is presently struggling under the weight of a burgeoning case load. As a result, solutions advanced by those concerned with the backlog of cases and the delay in bringing cases to trial, concentrate on "streamlining the system" - limiting examinations for discovery, eliminating "unnecessary" interlocutory motions, stressing pre-trial procedures dedicated to encouraging or forcing settlements - or bypassing the system through alternative dispute resolution mechanisms such as arbitration or private courts. In the rush to make justice speedier, it is easy to treat all potential civil litigation in the same light and to lose sight of the fact that there are certain cases which are of greater public importance than others.

My view is that access to the superior courts for cases of significant importance is essential. For example, we must ensure access to the superior courts to enforce rights under the Charter of Rights and Freedoms.⁸ The benefit and protection of Charter rights, particularly those under sections 7 and 15, are of immense importance to disadvantaged groups in society - the disabled, women, visible minorities, seniors, social assistance recipients, and native groups.

And further, disadvantaged groups must be able to participate effectively in the process of defining Charter rights and securing their enforcement. Often, the socio-economic background, training and education of lawyers and judges does not make them aware of, or attuned to, the needs and aspirations of these groups and individuals. They need to be educated in this area. Without the participation of these groups in Charter litigation there is a very real danger that their rights will not only be overlooked but substantially eroded.

My concern about access to the Charter for disadvantaged groups goes beyond structural issues. There are issues of content which will determine how the Charter will affect the lives of disadvantaged people. Of particular concern is the meaning of section 15. Some courts have interpreted section 15 as providing only formal equality - protection to a "similarly situated" individual or group against irrational treatment.⁹ An alternative approach, which seems to have the support of the Supreme Court of Canada, sees section 15 as imposing on governments an obligation to redress substantive inequality.¹⁰ This would require positive action to accommodate a disadvantaged group which otherwise would be excluded from enjoying the benefit or protection of the law.

The first approach provides limited protection to members of disadvantaged groups. The onus is on the applicant to establish that the treatment she or he has been subjected to is "irrational" and, according to some authorities, "unreasonable". The second approach recognizes the potential of the Charter as a positive instrument of social change, and focusses on the effects rather than the purpose of government laws and practices. A cursory review of section 15 reveals that judges in the lower courts do not grasp that the purpose of section 15 is to assist disadvantaged groups in their bid to achieve equality, and instead are apt to view the meaning of section 15 as if it were a matter of debate. It is therefore essential that disadvantaged groups, whose rights are so potentially impacted by how section 15 is interpreted, have access to the courts for the purpose of advancing their Charter rights and participating in the development of jurisprudence on the issue of how the Charter should be applied.

Second, we must ensure access to the civil justice system, including the superior courts, for human rights cases and for judicial review of government tribunals and government agencies.

The federal government, as well as all provinces and territories, have enacted human rights legislation. But this legislation is only effective if it can be enforced.

Complainants require access not only to the original tribunal but to the courts to appeal, or judicially review, adverse rulings. Given the fact that human rights tribunals are appointed according to varying criteria, (experience in human rights issues not always being the most important), the provision of legal assistance at the tribunal stage is important and the availability of effective judicial review is essential if human rights legislation is to have the effect its drafters intended.

The same is true with other administrative decision makers -- welfare appeal tribunals, workers' compensation boards, housing authorities, environmental appeal boards, and the host of other agencies whose decisions individually or collectively have a broad social impact. Meaningful access to these bodies and the ability to appeal, or otherwise review, their decisions is presently very limited. This is another weakness of the civil justice system which has to be remedied.

How do we provide economic access to the civil justice system in these important issues? Federal and provincial governments and the legal profession all have a role to play, but government commitment is especially essential in ensuring that access.

Governments must provide effective funding to individuals and groups for Charter litigation and regain their lost commitment to civil legal aid. The profession must seek ways of reducing the costs of litigation, including lawyers' fees, and developing ways of limiting the impact of those costs on the ordinary citizen.

Here are some specific proposals for providing more effective access to the civil justice system.

Charter Funding

In July, 1986, the federal government established a \$9 million fund administered by the Canadian Council on Social Development (CCSD), to fund Charter cases until 1989. While the concept must be applauded, the fund is restricted to cases which raise section 15 equality issues, are test cases which will affect a significant number of people and, most importantly, deal with matters which fall under federal jurisdiction.¹¹ Assistance is given on a case-by-case basis through a somewhat bureaucratic application process. Funds are not controlled by advocacy organizations for disadvantaged groups. Applicants must convince the CCSD that the particular Charter challenge they wish to pursue meets the specific criteria established by the fund.

The government of Ontario has provided \$1,000,000 directly to the Legal Education and Action Fund (LEAF), a group established to further the interests of women under the Charter.¹² While LEAF's work can, and will, indirectly benefit other groups, its focus is on women's sex equality issues. There are other disadvantaged groups such as disabled persons, the elderly, gays and lesbians, whose advocacy groups require basic administrative funding even to be able to educate their constituents concerning their Charter rights.

No other funding has been made available by governments for Charter challenges. In British Columbia, Attorney General Brian Smith recently stated that it is not the policy of the government to fund groups to take Charter challenges. He did indicate however that "[if] I thought that there were some Charter cases that might appropriately be dealt with under the Legal Services Commission (sic), and if that was the case, that we would provide funding that way to the Commission."¹³ In other words, funding on a case-by-case basis like the federal fund, rather than providing funds to advocacy groups to develop Charter litigation, is B.C.'s preferred approach.

Charter cases are arguably the most important cases being heard by the courts. They are certainly the most far reaching in their effect. If access to justice

means anything, it must mean effective access to the courts by citizens and representative groups to argue Charter issues. This can only be achieved by government funding.

Funding must come from both levels of government. Many, if not most, potential Charter issues involve provincial legislation or the activities of provincial agencies. This funding should not be limited to section 15 issues, but should embrace all Charter issues.

In my view, while case-by-case funding is required, the Ontario approach of providing funding to an advocacy group and allowing that group to set its priorities, within a set of general guidelines, is the preferable one. It avoids a bureaucratic application system which must be involved for each potential Charter case. Where time is of the essence, the delay in processing an application may well preclude a case being brought.

Most importantly, the Ontario approach allows interest groups to develop a long term strategy, to network with other groups, and to avoid duplication of Charter challenges. This is especially important as the courts are beginning to develop the parameters of the Charter. Funding should not be limited to advocacy groups but should also be provided to potential client agencies to enable them to

consult with similar groups across the country in developing a strategy and choosing appropriate cases to bring before the courts.

Some regulatory agencies, such as the Canadian Radio-Television and Telecommunications Commission (CRTC), have the authority to award costs to intervenors in regulatory proceedings. These costs are paid by the regulated utility, which adds them to its rate base and collects them from all subscribers through its rates. Although the intervenor is reimbursed for essentially all of its costs of intervening, each subscriber pays a miniscule amount as a contributor to those costs. The rationale is that all subscribers benefit because of that intervention. There may be a direct benefit, for example, in reduced rates. There is always an indirect benefit in ensuring a full public hearing, with full public participation, into the utility's operations. The same principles apply to government funding of Charter cases. In both the long and short run, all of us will benefit from this participation and therefore all of us should share in its costs.

Legal Aid

When legal aid was first established in Canada in the late 1960's and early 1970's, there were very high expectations for its ability to make the court system more

accessible to all citizens. Many Canadian legal aid programs were based on or influenced by American models. The rhetoric of E. Clinton Bamberger Jr., the first Director of Legal Services in the Office of Economic Opportunity, established by President Johnson in 1964, was representative of the prevailing enthusiasm in both the United States and Canada: "We cannot be content with the creation of systems rendering free legal assistance to all the people who need it but cannot afford a lawyer's advice. Our responsibility is to marshal the forces of law and the strength of lawyers to combat the causes and effects of poverty. Lawyers must uncover the legal causes of poverty, remodel the systems which generate the cycle of poverty, and design new social, legal and political tools and vehicles to move poor people from deprivation, depression and despair to opportunity, hope and ambition."¹⁴

In recent years, however, governments have systematically cut back funding for legal aid programs. Every civil legal aid program in Canada is now overextended and underfunded. The vision of legal aid as a means of providing the low income citizen with access to the civil justice system has been lost.

In a brief to the Justice Reform Committee, the Chairman of the B.C. Legal Services Society stated that the B.C. legal aid program is underfunded by at least \$15

million.¹⁵ The New Brunswick civil legal aid plan recently ran out of money. As a result of government failure to adequately fund legal aid programs, these programs have been forced not only to significantly reduce the scope of coverage for civil cases but also to institute very stringent financial eligibility guidelines. As a result, as Mr. Justice Zuber underlines in his Report, "In recent years, economic access to the courts has in large part become the preserve of the very poor, who can apply for legal aid and the rich who can pay their own way."¹⁶

However, even the very poor have limited access to the civil justice system because many of the issues which particularly concern them, including housing disputes, welfare claims, unemployment insurance and pension disputes, are no longer covered adequately, if at all, by legal aid programs which are forced by financial constraints to concentrate on criminal and family cases.

In 1984, the British Columbia government appointed a task force to look into the whole issue of legal aid. The task force recommended significantly increased funding for the Legal Services Society,¹⁷ but the provincial government has, to date, failed to implement the task force's recommendations. The Deputy Attorney General, who was the Chairman of that task force, is also the Chairman of the

Justice Reform Committee. He is now hearing many of the same concerns from many of the same people in 1988 which he heard in 1984.

A commitment to equal access to justice demands a commitment to adequately fund legal aid programs. That is not to say that providing more money to existing legal aid programs is the only answer; however, ensuring equal access to the justice system requires a commitment by governments to ensure that these programs do what they were established to do - provide effective legal representation to those who most need it, for the cases for which they need it, and for persons to whom such representation would otherwise not be available.

This means funding must be provided to enable legal aid programs to provide assistance where it is most needed - in human rights cases, landlord-tenant disputes, appearances before social assistance tribunals, other cases affecting those on low and fixed incomes, and on appeals and applications for judicial review in these areas.

Reducing Lawyers' Fees

As Mr. Justice Zuber points out in his Report, "The most common complaint about the justice system is that the cost of litigation is prohibitive."¹⁸ While court costs

are a factor, lawyer's fees are by far the greatest component of the cost of litigation.

Recently the government of British Columbia substantially increased court fees. Interestingly, there was an uproar from the organized bar but little complaint from low income and other disadvantaged groups. The bar was, of course, concerned about the impact on its clients who, already having access to the system, would be adversely impacted. The low income groups knew that increased court costs, given unaffordable legal fees, simply reinforced the inaccessibility of the civil justice system.

Is it possible to reduce lawyers' fees (and related costs) for conventional litigation? The traditional bar says "no". Representatives of the British Columbia bar reacted to recent criticisms of the Chief Justice of the British Columbia Supreme Court and the Insurance Corporation of British Columbia (ICBC) about the level of lawyers' fees¹⁹ by defending existing fee levels. "The costs to a law firm of operating these days are very, very expensive" said one spokesman.²⁰

Given this attitude on the part of the legal profession, the general populace might be inclined to agree with Shakespeare - "The first thing we do let's kill all the

lawyers."²¹ As a lawyer I certainly do not advocate such drastic measures. But imaginative solutions are required.

In my view, the best way to reduce legal costs is to develop dispute resolution mechanisms which do not require lawyers or at least limit the extent to which they are required. Many disputes involving the average citizen simply do not require the complex procedure of the existing superior court system. Indeed, that system inhibits rather than encourages effective resolution of these disputes.

I agree with Mr. Justice Zuber that the key issues are accessibility, speed, low cost, and simplicity.²² Whatever mechanism is adopted the procedure should be relatively straightforward and easy to understand. Individuals should, as far as possible, be able to carry on their own cases without the assistance of lawyers or other professionals, and there must be effective enforcement mechanisms. There is little benefit in having an inexpensive process to resolve a dispute if the successful party has to expend time and money in an attempt, sometimes futile, to enforce the decision.

No matter how simple the process, there will be cases where individuals will need assistance. But it is not essential that that assistance come from highly trained lawyers. There is a role for trained paralegals,

particularly before specialized tribunals. This may require some relaxation of the prohibitions imposed by the legal profession on "unauthorized practice". If trained paralegals can provide representation at a lower cost than lawyers, they deserve that opportunity and clients are entitled to the choice.

Contingency Fees

Not all provincial law societies allow lawyers to charge contingency fees. While contingency fees have a limited potential in providing access to the justice system (they are only effective where a lawyer feels there is a reasonable chance of success in an action for monetary relief), they do provide an avenue for an individual, who might otherwise not have access to the civil justice system.

The two main criticisms of the contingency fee are that it encourages litigation and that lawyers abuse the system by charging excessive contingency fees for relatively straightforward cases. I have not seen any persuasive evidence of the former, but the latter is a real concern. ICBC's general counsel stated in his recent complaint about high legal fees that some lawyers charge as high as 40 percent contingency fees and the \$160 million legal bill forecast for 1988 represents about 27 percent of the \$600 million ICBC will pay for all injury claims.²³

Just because they may be subject to occasional abuse, contingency fees should not be rejected out of hand. Their potential for providing access to the civil justice system cannot be ignored. To ensure their effectiveness, however, limits should be placed on the percentage a lawyer can recover, particularly where the quantum of damages, rather than liability, is the issue or where the lawyer expends relatively little time or expertise in achieving a large settlement for the client.

Cost Awards

No matter what steps are taken to ensure that an individual litigant can cover the costs of his or her lawyer, one of the strongest barriers to accessibility is the potential for being held responsible for the other side's costs. In my experience as a public interest advocate and previously as a legal aid lawyer, I encountered many people who were dissuaded from taking action to enforce potential rights, to gain redress from a wrong or even to defend an action against them, even with legal assistance available at little or no cost, simply because of the potential liability for party-party costs. While the rationale of our party-party costs system is understandable - to protect defendants against frivolous actions and to compensate plaintiffs for having to take court action to enforce their rights - it clearly discourages many people

from pursuing legitimate claims, particularly where the remedy sought is a non-monetary one.²⁴

The rule that costs always follow the event has been relaxed where the courts determined that a case raised a novel issue or was otherwise an appropriate one to bring and that the unsuccessful party should not be punished for instituting, or defending, the litigation. Appellate courts have, on occasion, granted leave to appeal on condition that the appellant (usually a government or government agency) pay the respondent's costs of the appeal regardless of the result. This approach can and should be extended.

The presumption that party-party costs automatically follow the result unfairly tips the scales in favour of those who have the resources to pursue litigation against those who do not. It should be re-examined. Judges should look at the relative financial position of the litigants, the merits of the case, and any other relevant considerations in determining which party should bear her or his own costs. This would limit the ability of a litigant with substantial revenues, as well his incentive, to "starve out" an opposite party with modest resources by running up the costs of the litigation.

Pro Bono Work

The legal profession should undertake more pro bono cases. The B.C. Public Interest Advocacy Centre has particularly benefited from pro bono assistance, both on cases the Centre has undertaken and in finding lawyers for individuals or groups where cases do not fall within the Centre's mandate but merit representation. Charter and other similar litigation is particularly amenable to pro bono work by lawyers in larger established firms. These cases are usually high profile. The defendant is more often than not a government or government agency, thereby limiting potential conflicts. Most importantly, these cases require the supporting resources which only major law firms can provide.

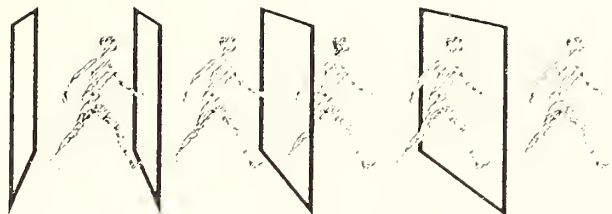
There is a widespread perception today that governments and the legal profession have no commitment to real access to justice. There is a lot of talk but very little action. The onus is on us all to respond to the challenge of those who are denied access to the justice system, as well as the challenges which have been presented by Mr. Justice Zuber's report and will undoubtedly be raised by the B.C. Justice Reform Committee. We say we reject a "Ritz Hotel" civil justice system. The time has come to prove it.

ENDNOTES

I wish to thank my colleagues Gwen Brodsky, Joan Vance, and Jennifer Harry for reading and critiquing earlier drafts of this paper.

1. The phrase has been most frequently ascribed to Mathew L.J. according to R.E. Megarry, Miscellany-at-Law (London, 1955), p. 254.
2. Justice Reform Committee Terms of Reference, Ministry of the Attorney General, January 8, 1988.
3. Ibid.
4. Report to the Attorney General by the Task Force on Public Legal Services in British Columbia, August, 1984.
5. Zuber, Report of the Ontario Courts Inquiry (Toronto, 1987), pp. 68-69.
6. (1970), 79 Yale L.J. 1049.
7. Supra, note 5, p. 66.
8. Canadian Charter of Rights and Freedoms, in the Constitution Act, 1982, S.C. 1982, c. 11.
9. e.g. The Ontario Court of Appeal in R. v. Ertel (1987), 20 O.A.C. 257, leave to appeal to the Supreme Court of Canada denied, December 3, 1987. For a critique of this decision see the case comment of M. David Lepofsky and Hart Schwartz, (1988) 67 Canadian Bar Review 115.
10. R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at p. 344, (1985), 18 D.L.R. (4th) 321 at pp. 359-60. See also, in the context of federal human rights legislation, Action Travail des Femmes v. C.N.R. Co., (1988) 40 D.L.R. (4th) 193. Although these are not section 15 cases per se, they involve the Charter and religious freedoms (Big M) and sex discrimination under Human Rights legislation (Action Travail), and suggest that the court will take a purposive approach to section 15.
11. "Here's How Charter Challenges Can be Funded", Canadian Human Rights Advocate, Vol. 111, No. 1, January, 1987, p. 10.
12. Mary Eberts and Gwen Brodsky, LEAF Litigation Year One, March 31, 1986, p. 1.
13. Debates of the Legislative Assembly (Hansard), Tuesday, April 19, 1988, Vol. 8, No. 2, p. 3965.

14. Quoted in Paul H. Frances, "Legal Aid: The Demise of Idealism" (1973), 23 Wayne L. Rev. 1261, at p. 1264.
15. "Legal Aid Cash Starved, Chairman Says", The Vancouver Sun, May 14, 1988, p. A14.
16. Supra, note 5, p. 72.
17. Supra, note 4.
18. Supra, note 5.
19. "Soaring Legal Bills Drive Up Auto Insurance", The Vancouver Sun, May 14, 1988, p. A1. "Chief Justice Takes Aim at Unwarranted Lawyers' Fees", The Vancouver Sun, May 16, 1988, p. A1.
20. "Chief Justice Takes Aim at Unwarranted Lawyers' Fees", Supra, note 19.
21. Dick the Butcher in Henry VI, Part 2, Act IV, Scene II.
22. Supra, note 5, p. 102.
23. "Soaring Legal Bills Drive Up Auto Insurance", Supra, note 19.
24. For example, an action by a representative plaintiff for a declaration against a government or governmental agency, an application for judicial review or an action for injunctive relief. A related problem is the requirement that a plaintiff undertake to pay any damages occasioned to the defendant as a result of the granting of an interim injunction.



Conference
on Access to
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Congrès sur
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justice civile

MAKING THE JUSTICE SYSTEM BALANCE:

BEYOND THE ZUBER REPORT

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Making the Justice System Balance: Beyond the Zuber Report

In both our civil and criminal justice systems, we rely on a highly individualized dispute resolution process in which each litigant must both prosecute and present his or her own case with limited intervention by the court system and no direct involvement by the judiciary. Neil Brooks has noted that the adversary system reflects the "political and economic ideology of classic English liberalism in three ways: by its emphasis upon self-interest and individual initiative; by its apparent distrust of the state: and by the significance it attaches to the participation of the parties"¹.

Much of the current discussion of access to justice is concerned with the inequities which flow from the adversary system as well as a growing recognition that participation of parties poses particular and difficult problems. Parties with limited resources and with small or diffuse claims face the greatest difficulties: especially when they are litigating against large organizations be they trade unions; corporations; or an arm of government.

It is worth emphasizing that the adversary system reflects an individualistic, liberal view of society and grows out of the prevalent social and political philosophy

of western society. Indeed, most lawyers would argue that the foremost concern of the common law and the adversary system is the rights of the individual.² Litigation is considered as a means of determining disputes between two individuals, or perhaps between two business entities. Despite the generous expansion of contemporary rules of procedure with respect to both joinder of parties and claims, judges and lawyers alike tend to perceive civil litigation in terms of individuals and their individual causes of actions. Thus, we find opposition to reform of the law of civil procedure as it relates to bringing class actions, despite various law reform studies that have been undertaken - notably in this province. These studies recommended the liberalization of the possibilities for groups to collectively litigate, a more activist role for the bench, the introduction of contingency fees and the abolition of the punitive provision that costs follow the cause in class actions.

By framing the question of how to balance the justice system, we acknowledge the implicit suggestion that there is a justice "system" and that it is in a state of imbalance. A recognition of the individualism which underlines the adversary system and the problems it creates can be found in the Federal government's recent review of the justice system, the Neilson Report, which questions the cohesiveness of the administration of justice in Canada. The Report

notes that in addition to the disjointed and individualistic nature of Canada's justice system, there are two important related issues:³

The first has to do with the extent to which the participants in the system as a whole are interested in, or capable of, viewing their interaction in systemic terms. The common law tradition discourages systemic rationalization, and this appears to have extended to not thinking about why relationships within the system are as they are, or how they could be improved.

The second related issue is that historically there has been very little empirical data about what is actually happening within the justice system.

To what extent then, are the procedures and reforms that we advocate, appropriate? And do such reforms advance values which we wish to codify and incorporate into the justice system.⁴ Should the state encourage class actions and what are the appropriate goals of such litigation? An analysis of the administration of justice must similarly evaluate the premises and philosophical underpinnings of legal aid, contingency fees, and prepaid legal services --to mention but a few of the issues which we have been asked to consider.⁵

I do not believe we can embark upon a discussion of law, substantive or procedural, as if legal issues could be considered in a political vacuum. Richard Abel, of UCLA's Faculty of Law, believes that much of the writing on legal aid (as well as other areas of the common law and in

particular, procedural discourse) is flawed by the insistence on divorcing law from politics. He writes:⁶

The prevailing ideology of advanced capitalism--liberal legalism--is grounded on that very premise. The institution of legal aid itself attempts to fulfill the promises of liberal legalism without first effecting any change in fundamental political relationships.

Though I do not intend to undertake an analysis of the political philosophy underlying the Canadian civil justice system, I urge that we confront the fact that in each area of decision-making: class actions, legal aid, the independence of the judiciary, and the legal profession, the determination of the approach, or role, to be assumed by a lawyer or a judge is often a political, and seldom a value-free decision.

The very belated introduction to Canada of a state-funded legal aid scheme is an historic example. The political reality is that neither the legal profession, nor any of the partners in Canadian federalism, had even the most basic concern with respect to "access to justice" prior to 1967 when the Ontario Legal Aid Plan was introduced. We can criticize or praise the "judicare" model but despite the introduction of American legal services model, along our southern border, we opted for a combination of the British and Scottish models of legal aid. The more fundamental issue is that, until 1967, there was no political will to attempt to rectify even the most egregious wrongs within the

adversary system. Instead, in the best interest of the dominant elements in Canadian society, the myth was perpetuated that all Canadians had a right to have their disputes dealt with by the court system.

Lawyers, as well as law students, were as aware in the sixties, as we are today, that our court system was slow, that it was expensive, and that courts were not where the average citizen had his or her disputes or conflicts resolved. In the sixties our country was coming of age. We recognized that we had the opportunity to develop certain unique aspects of the social contract - particularly medical care - but there was little or no concern on the part of the public, or their elected representatives, for legal care. Going to law was not equated with going to the hospital. Health care was (and is) considered to be a basic human necessity, while legal care was considered to be a luxury to be enjoyed, or rather endured, only when absolutely necessary --a divorce, or perhaps a motor vehicle accident claim.

Are Canadians, today, interested in analyzing the systemic nature of the administration of justice, The Report of the Ontario Courts Inquiry, written in 1987, gives a qualified but important "yes" and offers a significant analysis of the justice system as a whole, in addition to

its well-publicized recommendations as to court jurisdiction and court administration.

In his analysis of the justice system, Mr. Justice Zuber accepted the challenge of grappling with the administration of justice as a coherent whole. His report sets out the general principles to be applied in assessing the justice system and recommending reform.⁷ Perhaps the most significant element of this Report is its strong articulation of the responsibility of the court system and the administration of justice to the Canadian public. Zuber states that the "court exists to serve the public. Lawyers, judges, court registrars and court clerks all serve the justice system", which in turn, according to the author, exists for the benefit of the public.⁸

This Inquiry would go a step further and state emphatically that not only counsel should be cast in a social service role, but that the entire court system has purpose only to the extent that it serves the community.

Committed to the vindication of the rights of individuals, the classic liberal values embodied in the Canadian adversary system were perceived, with some legitimacy, as being opposed to community or communitarian values. In the chapter titled "General Principles Underlying Court Reform", Zuber affirms the responsibility of the justice system to the community, taking our discussion well beyond the traditional "access to justice"

concerns of economic accessibility and delay. By articulating the straight forward premise that the justice system exists not only for the benefit of lawyers or judges, but for the public benefit, the Report has offered Canadians a unique holistic analysis of the provision of civil justice.⁹ The Zuber perspective challenges conference participants to develop models of analysis which broaden our understanding of how the justice system impacts on the various socio-economic communities that make up contemporary Canadian society. By acknowledging that the courts and the administration of justice must serve the community, the challenge is clear: to understand the needs of the communities that the justice system is serving.

This paper acknowledges and accepts the major recommendations of the Zuber Report - the inefficiency; the costliness; and the lengthy delays of the administration of justice. In considering these concerns and the recommendation of Zuber, I analyze in some detail two approaches - one private and one public - to these issues and specifically to broadening access to justice. Similar analysis would be beneficial when considering the implications of contingency fees; lawyers' advertising and the use of paralegals and non-lawyers in providing traditional, case-by-case, legal services and more broadly-based community education and development. The challenge

remains for Canadian sociologists of law to study and analyze the extent to which the administration of justice has fulfilled its obligation as articulated by the Zuber Report of serving and responding to the needs of the community.

The Access Movement:

Access to justice is a concept which has only recently come of age in Canada. It is in many ways surprising that law and particularly the justice system were so belatedly perceived to be a legitimate social service. The history of the access movement, and particularly legal aid, has yet to be written but it is generally agreed that public awareness of the need for legal aid services dates only to 1951. The introduction of the original Ontario Legal Aid Plan undertook to assist indigent persons with defence representation in serious criminal matters, on a voluntary basis. But, as indicated, the social policy commitment to legal aid had to await the recommendation of the 1965, Attorney-General of Ontario's Task Force on Legal Aid which recommended that the British judicare and the Scottish duty counsel systems be introduced to Ontario under the administration of the Law Society of Upper Canada and funded by the province.

Writing in the introduction to their volume Access to Justice and the Welfare State: Professors Mauro Cappelletti and Bryant Garth reiterate the concern that has been expressed by many scholars who have studied and written about recent attempts to develop justice systems which are more responsive to needs of their unique national and local societies:¹⁰

"Access to justice" implied continuing social development, involving a constant debate about how much access to provide and how much and what kind of justice should result.

This paper recognizes that the formal, (generally) rule-oriented, attempts to provide equality of access have generally been found inadequate. In practice, they have amounted to denials of effective entry to and utilization of the court system, rather than providing more preventative legal services. We also recognize that access to traditional models of dispute resolution--particularly the court system--is obtainable only at a relatively high cost. This is particularly the case if such access reforms are confined - as has been the case in Canada - to subsidizing lawyers and to utilizing traditional judicial approaches. The pressure of costs for legal aid, judicial appointments, new court houses and generally for the administration of justice - especially in times of strained governmental budgets, like the present - militates in favour of "wholesale justice"¹¹, which may, in turn, come only at the expense of the quality of justice.

This paper attempts to examine some of the recent developments with respect to legal aid services and prepaid legal services. Space does not allow me to do full justice to either of these topics or to address the significant developments with respect to the utilization of paralegals in the public and private sector and the development of the private, often suburban clinics that have recently developed in the United States.¹²

Prepaid Legal Services:

Prepaid is perhaps the most significant comprehensive alternative to fee-for-services to develop in Canada during the eighties. By paying a fixed premium, either personally or in concert with her employer, a subscriber - generally a middle income earner - is entitled to certain services free of charge when required.¹³ As with any insurance scheme, all participants pay a premium which is fixed on the presumption that only a limited number of subscribers will require legal services.

Prepaid legal services schemes have existed in the United States for nearly two decades but have only begun to be developed in Canada during the last few years. By the early eighties, prepaid services were becoming popular with American workers and being requested as a fringe benefit by

their unions - the most extensive being developed by the United Auto Workers for employees of General Motors, American Motors and Chrysler. As well, one of the major American chains of private legal clinics (Hyatt Legal Services) began to provide prepaid legal insurance to a union around the same time, but was not initially prepared to provide prepaid legal services to the general public as it was not considered economically viable.¹⁴ I underline that legal services plans in the United States have grown both in numbers of subscribers and in services provided. They are being marketed by a large number of the major insurance companies as well as by direct mail organizations such as Diners Club, Visa, and Mastercard.¹⁵ The growth in both the market and models of legal services is being generated by employee groups and, it would seem, by the public as well. (Much of the growth of these new models of legal services can be attributed to the significant growth in the legal profession during the last two decades and to the need by those sectors of the profession that are under-employed to generate new markets for their services.)¹⁶

The first private Canadian legal services plan was created in 1978 - a prepaid open-panel scheme through the United Grain Growers Services of Winnipeg. In the same year, the Prepaid Legal Services Program of Canada, a resource centre to provide information and to conduct

research on prepaid legal services in Canada was established in Windsor. In spite of these early developments, growth of prepaid programmes in Canada has not kept pace with the United States. The reasons are clear: provincial law societies have not encouraged (and in some instances have discouraged) prepaid legal services; the federal and provincial governments did not exhibit any commitment; and consumers didn't seem to perceive the need. In 1980, the Canadian Labour Congress condemned the schemes as "make-work" plans solely for the benefit of lawyers.¹⁷

Though prepaid and legal insurance had been discussed for more than a decade, it was not until the United Auto Workers' (now Canadian Auto Workers) 1984 agreement with General Motors that a large work-force was brought within a private legal services plan in Canada. When the CAW included the same provisions in their contracts with Ford, Chrysler, and Navistar (formerly International Harvester), it became apparent that, with over 75,000 union members in Ontario and Quebec, each receiving approximately \$60.00 per year from their employer, approximately 4.5 million new dollars were about to be expended annually in legal services. Although these funds are small in comparison to federal and provincial expenditures on legal aid, they are nonetheless significant and were recognized by the organized legal profession to be the tip of legal insurance iceberg.

Rather than the consideration of the needs of union members, the confrontation and, ultimately, the litigation between the Law Society of Upper Canada and the CAW Plan focussed principally on the concern of the governing body as to the whether the Plan would be a closed - "salaried" lawyer - or open plan - offering freedom of choice to use private practitioners as well as staff lawyers. As well, the Law Society opposed the requirement that all private lawyers who accepted work for the plan members must agree to become cooperating lawyers and be paid at the proposed fee schedule of sixty dollars per hour.¹⁸ In some respects, the confrontation between Ontario's Law Society and the CAW Legal Services Plan was similar to attempts by the Ontario Legal Aid Plan, fifteen years earlier, to thwart salaried clinic lawyers, and specifically Osgoode Hall Law School's Parkdale clinic. In both instances, the issues were couched in terms of the right of consumers of legal services to freedom of choice -- the heart of the matter was a concern by the profession to preserve the private, individualized model of legal services which had characterized lawyers' services for the better part of two centuries. New funding of legal services was encouraged by the professional leadership, as long as the private practitioner remained the model of delivery and control rested with the profession.

As with salaried legal aid lawyers, the profession ultimately agreed that the CAW plan should continue to operate, utilizing salaried staff lawyers and either cooperating lawyers in private practice who agreed to the \$60 hourly fee or non-cooperating lawyers who could extra-bill the Plan member. The latter concept was agreed to by the CAW Plan to avoid litigation and to allow the Plan to grow. As with the medical profession, the question of extra-billing of professional fees rather than the quality or type of service was the source of tension.

Although limited statistical data is thus far available, the CAW Legal Services Plan has been successful in encouraging utilization of the plan by union members, their families and retirees -- with a usage rate of 44.8% in 1987 and 43.0% in 1988.¹⁹ Of interest is the comparative use of staff and private lawyers during the Plan's early years:

	<u>1986</u>		<u>1987</u>		<u>1st Quarter '88</u>	
	cases	(%)	cases	(%)	cases	(%)
Staff	17873	51.2%	18014	51.8%	5659	56.0%
Cooperating 22.8%	9806	25.2%	8447	24.3%	2305	
Non-Cooperating	7960	22.8%	8027	23.0%	2058	20.4%
Notary	278	.8%	301	.9%	77	.8%
TOTAL	34917	100 %	34789	100 %	10099	100 %

The division of lawyer utilization has remained equal between the staff lawyers and the cooperating and non-cooperating lawyers with some indication that there may be a gradual increase in staff lawyer utilization. The distribution of work between cooperating and non-cooperating lawyers remains unclear at this early stage of the Plan's development.²⁰ The Plan's caseload is divided between wills and estates (33%); real estate - including real estate litigation (37%); family law (15%); and other litigation - landlord and tenant, motor vehicle, consumer, administrative law and criminal (15%). The extent to which the Plan's members are using legal services for the first time, or to a greater extent, remains to be examined by future research projects. The initial data from the CAW Plan indicates a higher user rate than the United States UAW Plan, which currently averages a user rate of 38%. The relative youth of the Canadian plan and limited available data does not allow us to determine the extent to which the plan is providing "advice only" or actually handling and completing matters.²¹ The high percentage of wills may suggest that many users of the Canadian Plan are utilizing necessary legal services that had previously been considered too expensive.

In response to the considerable publicity and interest in the CAW plan, three insurance companies in

Ontario announced in 1986 that they were preparing legal insurance schemes - one offered a truncated form of legal insurance which provided an all-hours legal advice by phone to policy holders.²² As well, the Law Society of Upper Canada in conjunction with the Ontario branch of the Canadian Bar Association were investigating the possibility of making available their own plan, intended to provide broader coverage than the CAW.²³

The principal benefit of prepaid plans is the increased access to the justice system through some degree of equalization of the availability of professional services. Citizens who would not seek legal services have the opportunity, through the limited fixed individual costs, to consult a lawyer. Thus the decision to consult a lawyer is made on perceived needs and professional advice rather than the client's ability to purchase legal services. The extent to which the prepaid model will deliver reasonably priced legal services in Canada remains unclear, but we have confirmed that salaried legal aid service is generally less expensive than private lawyers delivering comparable services.²⁴ With routinization of services, economies of scale, the use of paraprofessionals, computerized practices, and lower overheads, it may be safe to predict that prepaid systems utilizing staff lawyers and paralegals will also be

a less expensive delivery model than the private bar. As Wydrzynski writes:²⁵

..prepaid legal service plans do not provide coverage for every conceivable legal problem which could arise. Control of costs is critical to plan survival and benefits must be geared to the financial reality of the plan. While the benefits must correspond to the members' needs, extravagant legal service must necessarily be excluded. Thus, most plans provide coverage for routine legal services only: those needs which are most likely to be encountered by the middle-class consumer (eg. purchase and sale of real property, drafting of a will, family law matters, etc.) Benefits are tailored to the members' perceived needs, and then usually only those services which are capable of cost control.

Prepaid schemes embody a relatively straightforward concept of risk sharing. By spreading the cost of individual legal services across a broad cross-section of society, legal costs become more affordable for the majority of Canadians. As the plans are privately funded by employer and sometimes by employee contribution, or by insurance companies, various designs with various services can be developed and marketed. Although the organized legal profession remains committed to monitoring and perhaps, in some instances, to controlling prepaid developments, the confrontation between the CAW Plan and the Law Society of Upper Canada and its resolution, indicates that attitudes are changing. With appropriate endorsement by government and a commitment by prepaid plans to provide legal services at a reasonable cost, the organized legal profession has accepted the inevitability and the utility of prepaid group legal plans. Although the legal profession may attempt to

thwart new access models on the grounds of limited choice of counsel or on the basis that fees offered to private practitioners are considered too low, such opposition in face of the growing success of the CAW Plan, as well as the recent endorsement of prepaid plans by the Federal government is futile and counter-productive.²⁶

Diana Majury wrote in 1981:²⁷

the most valuable tool for public education in this regard will be the existence of successful legal service plans, responding to the presently unmet legal needs of middle and lower income Canadians. Once one or two major plans are operational in Canada, the advantage of this new delivery system will be more readily apparent.

I suggest, that by the early 'nineties group prepaid and insurance plans will be a recognized and well-established element in the panoply of legal services in Canada. The extent to which these plans will assist in providing lower cost legal services to middle income consumers is unclear but undoubtedly they will provide an affordable vehicle for the purchase of legal advice and assistance with respect to certain "typical" legal problems.

Legal Aid Services:

Much has been written about the phenomenal growth of legal aid services in Canada and the western world generally during the last several decades. The governing bodies and professional organization of Canadian lawyers have exhibited a growing interest in legal aid matters since the creation of the

Ontario Legal Aid Plan in 1967. The provincial law societies have attempted to administer the legal aid plans through committees generally composed of lawyers. In provinces where such direct control was opposed by the provincial government, the law societies have sought and generally obtained a significant and dominating voice in the administration of legal aid plans, while simultaneously asserting their members' claims to adequate payment for legal assistance.

The organized legal profession's intentions and attitudes toward the various provincial legal aid plans have often been unclear. It has been and remains my opinion that the Canadian legal profession's positive response to government funded legal aid grew out of the stimulation of employment and the provision of a significant source of income for the growing number of young lawyers. As well, the system's attractiveness was increased by the profession's enhanced public image in providing funded legal aid assistance to some of the country's impoverished. Although rather late in arriving, the support of the legal profession can no longer be doubted. The Canadian Bar Association, in the report of its National Legal Aid Liaison Committee, is forthrightly assertive in its advocacy on behalf of legal aid services in this country:²⁸

Legal aid is not an expensive social experiment, affordable only in time of economic growth. Rather, it is the expression of the basic, democratic principle of the protection of the rights of individuals against the overwhelming power of the state. As such, legal aid is essential in order to ensure equal access to justice in

our society. Justice is indivisible; if it is not accessible to everyone then it does not exist.

The commitment of the organized profession to legal aid services cannot be underestimated in terms of its impact on the developing of commitment of federal and provincial funding. Nonetheless, the Canadian legal profession remains wary of salaried lawyers and continues to perpetuate a rather narrow perspective on legal aid services, as limited to individualized claims to be handled as far as possible by lawyers in a similar fashion to the claims of their private clientele. Two recent studies - one by the Federal government and the second by the Canadian Bar Association - have acknowledged that legal aid has become a component of the social services network in Canada and that such services are provided by the public sector, as well as the private sector, and generally at a lesser cost. The Neilson Task Force's analysis of federally funded services creates a cost effectiveness back-drop to contemporary discussions of legal services. While recognizing and committing federal resources to legal aid, the Report is written in the minor key of "restraint":²⁹

The justice system is at a turning point for a wide variety of reasons. Principally these have to do with the stresses inherent in operating overburdened, costly institutions in times of restraint, and the advances that have been made in making the law and the institutions that give effect to it more reflective of the principle of social equity.

I will return to the question of restraint and its impact on legal aid services but let us briefly examine the legal aid structure that has been erected by the provinces

with considerable financial assistance from the Federal government during the last two decades. In 1984-85, \$182.1 million or \$7.22 per capita was expended on legal aid. On an inflation-adjusted basis, the national per capita expenditure on legal aid declined slightly in 1984-85, following minimal increases in the two previous years.³⁰ Per capita expenditures on legal aid vary significantly from province to province with Quebec's \$9.17 being the highest provincial per capita expenditure and Prince Edward Island the lowest with a per capita expenditure of \$1.55.³¹ As well, the fluctuation in provincial legal aid expenditures varies from year to year. The national per capita expenditures decreased by 3% during 1984-85 on an inflation-adjusted basis - the most notable decreases were reported in New Brunswick (-14%), Ontario and Manitoba (both down 6%) and British Columbia (-10%).

Although the provinces are charged with responsibility for the administration of justice - a fact which has allowed a diversity of legal aid plans to develop in Canada - the Federal government has a growing financial investment in legal aid plans. Commencing in the early seventies, the Federal government agreed to fund approximately 50% of criminal legal expenditures.³² As the cost of legal aid has escalated, the provinces have expressed dissatisfaction with the criminal legal aid cost-

sharing formula - which has seen the Federal contribution fall to approximately 46 per cent of national criminal legal aid costs.³³

Civil legal aid is cost-shared under the Canada Assistance Plan (CAP) as an "item of special need, provided to persons defined as "needy" under the "assistance" provisions of the scheme. CAP has become a vehicle for underwriting the cost of provincial legal aid programs on an open-ended basis, resulting in substantial financial advantages to participating provinces.³⁴ The 1985 funding of civil legal aid under CAP was approximately \$22 million.

The tension over funding and the rising costs of legal aid may have temporarily abated with renegotiation of the Federal Provincial cost-sharing agreement to run until 1990, as well as reduced emphasis on "cost-per-case" by the Federal government. The current arrangements remain in conflict with each other. The Federal Provincial Agreement with respect to criminal legal aid attempts to impose minimum standards concerning representation in criminal matters and has been criticized for its ineffectiveness in this regard and for setting ceilings on the federal contribution. The Canada Assistance Plan funding of civil legal aid was established by the Federal Department of Health and Welfare and has been criticized for having no

ceiling and no minimum standards.³⁵ The legal profession has queried whether, in responding to the federal funding priorities, the provincial legal aid schemes have set their priorities based on federal funding rather than quality of services or community needs:³⁶

In responding to this confusion, some provinces have had to cut corners, limit coverage and distort priorities in order to enhance or protect federal recoveries. If services are to be cut, they will tend to be where there are no minimum standards, if services are to be added, they will tend to be where there are no payment ceilings.

The recent paper of the National Legal Aid Liaison Committee of the Canadian Bar Association, Legal Aid Delivery Models: A Discussion Paper, attempts to clarify the on-going debate in Canada concerning the cost of legal aid. The paper's authors are critical of those studies which compare provincial schemes on a "straight cost" basis.³⁷ Concern is expressed that a straight cost analysis of judicare or staff lawyer models ignores the significant question of quality:

The flip side of cost is quality. Without holding quality constant across cases, cost differences reflect little more than differences in quality. For example, in a staff lawyer model, one can crank up the caseload per lawyers, with an attendant drop in quality and produce lower costs per case. Equally, in a judicare model, one can depress the tariff, thereby reducing costs and likely also quality.

As with most legal aid systems that have developed since 1945, provincial legal aid services in Canada are oriented toward representing clients involved with the courts, and an attempt is made by most plans to

compare the legal aid recipient with the fee paying client in determining whether services should be given. In fact, legal aid schemes have continued to ignore the differences between the recipient of legal services and the more typical users of the legal aid system, rather than acknowledge that "poor people are not the same as rich people" and that their problems are not the same.³⁸

In two provinces, New Brunswick and Alberta, legal aid is delivered exclusively by the "judicare" model, where all criminal and civil legal aid services are delivered by private lawyers and the plans are administered by a committee or board reporting to the provincial law society. In contrast, Saskatchewan, Nova Scotia and Prince Edward Island are at the other end of the legal aid spectrum with virtually all legal provided by salaried lawyers.³⁹

In the other provinces, various forms of the mixed delivery system have developed. These models of legal aid have become known as "the Canadian compromise" because of their mixing of the English judicare with the American community-based salaried lawyer system. Judicare is the dominant aspect of the mixed delivery model in Manitoba and British Columbia, while in Quebec and Newfoundland the proportions are reversed with 60 to 70 per cent of legal aid cases handled by staff lawyers.⁴⁰ Ontario is a successful mixed delivery system combining the judicare and clinic models of service. Although it initially opposed

community-based clinics with salaried lawyers and a more broadly based welfare rights agenda, the profession in Ontario has gradually come to accept the concept. There are over 60 clinics in Ontario operating with many of the features of the original American welfare rights model of legal services. Some of these clinics provide specialized legal services or serve specific constituencies such as the elderly, tenants or younger people. Community-elected boards of directors have some authority to set both case criteria and eligibility standards for their clinics, allowing the clinics to move beyond a totally service-dominated program and to attempt to achieve a more reform-oriented approach to the provision of legal services. As an auxiliary to the established judicare scheme, the Ontario clinics have generally developed a more strategic approach to legal services, and in many instances, moved beyond a service model to become involved to some extent in community education, community development and some significant law reform litigation.

Much of the recent academic literature as well as the focus of professional and government analysis has been a comparison of the various models of legal services. Much of this literature has tended to be defensive or argumentative and very little sophisticated analysis has emerged. Yet, it is possible to state that a consensus seems to be emerging in favour of the mixed delivery model. The 1985, Canadian

Bar Association National Legal Aid Liaison Committee Report, Patterns in Legal Aid, noted that "in equivalent cases, staff lawyers generally provide similar services for less". This has been confirmed by a number of provincial studies in Nova Scotia, Quebec and British Columbia.⁴¹

A recent evaluation study of Manitoba legal aid found that on average, for most family cases, judicare lawyers took 50% longer. In criminal cases private practitioners took as much as 200% longer than their staff lawyer counterparts.⁴² The disparities were particularly noticeable in the first quartile of case costs - staff lawyers' average being approximately one quarter of the cost of the private bar, provoking the evaluator to recommend changing the tariff structure to minimize the incentive to maximize time.⁴³ It should be noted that the Manitoba study dealt exclusively with high volume cases, compromising 55% of the total caseload. The differential for low volume cases appear to be more modest.⁴⁴

Recent legal aid evaluations have begun to grapple with the question of the quality of legal aid services, recognizing that the cost effectiveness debate becomes a digression from the crucial discussion of the democratization of legal services and provision of appropriate legal services to respond to the socio-economic needs of underprivileged and low-income persons. Mary Jane Mossman wrote several years ago:⁴⁵

To an extent, the focus on the cost-effectiveness has distracted from, rather than contributed to a better understanding of legal aid objectives. Thus, rather than questioning decisions about equality objectives or the approaches to providing legal aid services, most legal aid efforts have been directed to assessing models of delivering such services; and because both salaried and private practice lawyers provide essentially similar services, the focus on cost-effectiveness has been directed very narrowly indeed.

There is no doubt that quality and models of legal services remain a significant issue for the funders and providers of legal services. A holistic analysis of legal aid services would obviously attempt to ascertain the attitude of the public and the communities served with respect to these issues. Such analysis is only currently beginning to develop.⁴⁶

CONCLUSION:

In examining the significant recent developments in Canada with respect to access to justice, it becomes clear that issues of quantity and quality are inevitably in tension, and that similar tensions have been carried forward to the more recent development of prepaid legal services. We find limited evidence that concern for community needs or the principles articulated for the justice system by the Zuber Report have permeated the Canadian legal profession. The uneasy partnership which has existed between government and the legal profession with respect to legal aid and other new models of legal services

continues. Though committed to expanding government funded legal aid, the profession provides only limited pro bono services in an organized fashion - British Columbia being the exception to this generalization.

Despite concerns expressed about motivation, the on-going support of legal aid services by the Canadian legal profession has stimulated the growth of federal and provincial funding. Today, the profession is active in virtually all aspects of the development and administration of legal aid. Within judicare jurisdictions, most regions have area committees which are composed primarily of volunteer members, generally lawyers who set policy and deal with appeals. The provincial base of legal aid and the active involvement of the provincial law societies has meant that the profession has been vigilant about government involvement and government attempts to restrict funding or to reorganize legal aid services. Canadian lawyers are committed to the various models of legal aid which are subsidized by government and would tolerate neither an attempt to dismantle the existing programs nor a massive reduction of government funding, as was seen in the United States in the early eighties.

Thus we continue to grapple not only with questions regarding the services that should be handled by the developing access to justice schemes, but with the question of the appropriate model or models of legal

services is far from settled. Debate as to whether we should encourage private practitioners to provide the legal services for previously unserved members of Canadian society or whether we should rather opt for the staff and clinic model of legal services continues in light of government concern about escalating costs. Although we perceive some balance developing between the extremes, we continue to discern tensions between the goals of individual and social justice. As we move forward into the era of the Charter and the implications of the equality provisions of section 15, the issues of mass justice and social inequality must be addressed, as Canadians clarify the role of a responsive, fully-funded and expeditious justice system that is accountable to the Canadian public

within the contemporary welfare state.

1. N. Brooks, "The Judge and the Adversary System" in The Canadian Judiciary, Osgoode Hall Law School, (1976) at 98.

2. Ibid. Brooks quotes from the editorial page of a bar association journal to illustrate this argument:

If you believe in the Anglo-Saxon common law tradition, that the individual is the important unit of society, and that state exists to serve him, then it seems that the adversary system is preferable. If you hold a corporate view of society, that is to say, that the community is the important unit and that the citizen must be primarily considered as a part of the corporate unit, then it seems you should champion the inquisitorial system.

3. Improved Program: Justice System A Study Team Report to the Task on Program Review, 1986, Minister of Supply and Services Canada, at 12, 13-15. In discussing, the justice system, the writers' note that the linkages within the justice system are "of a somewhat tenuous character. Indeed, the adversarial, individualistic and discretionary character of the legal

profession might at time be thought to insinuate itself into the disjointed relationships of the institutions, public and private, that compose the structure of the system."

4. Supra note 1 at 98, Brooks makes the point that it is only recently that we have come to recognize that procedure is not value free. He refers to the writings of Cappelletti and Damaska. We can no longer attempt to right a system without attempting to understand the roots and origins of that system.

5. Supra note 4, at 13. The Federal Study Team on the Justice System acknowledges that there is a justice system but with very weak interrelationships between the participants. "This is because there is no tradition of doing so, nor is there a generally held perception that more systemic thinking and better information about how one part of the structure affects others would be helpful."

6. R. Abel, "Law Without Politics: Legal Aid Under Advanced Capitalism", 32 UCLA Law Review (1985), at 474, 476-485.

7. Hon. T.G. Zuber, Report of the Ontario Courts Inquiry, 1987 at 66-70 who writes:

Courts grew out of the necessity for society to provide a way of resolving disputes which did not threaten the fabric of society. The courts continue to exist because, despite their problems, the people have confidence in the integrity and wisdom of the court, and they continue, in time of stress, to turn to the court for the vindication of their rights.

8. Ibid. at 66-69. The Report adopts the approach of the noted American proceduralist, Arthur T. Vanderbilt and asserts the right of every litigant to a prompt and efficient trial; at a reasonable cost; and to representation by competent lawyers.

9. Such a holistic approach which attempts to approach civil justice issues from the perspective of a social service that responds to the needs of its community will require a new framework for analysis. If the fundamental values of the justice system are moved from an individualistic approach to a more collectivist approach the role of judges and lawyers in the administration of justice - courts and legal services - must be reconsidered. Certainly, the significant involvement of citizens

groups in the administration and "control" of legal services for all classes of society would seem appropriate. As well, the opportunity for non lawyers to participate in the justice system as the "deliverers" of the service such as community legal workers within our clinic system or advocates and conveyancers in the private sector would have to be reconsidered from the perspective of the funders of the social service and more importantly the needs of the public.

10. Cappelletti and Garth, "Access to Justice and the Welfare State: An Introduction" in Cappelletti (ed.) Access to Justice and the Welfare State, 1981 at 2.

11. Ibid.; Calabresi, Access to Justice and Substantive law Reform: Legal Aid for the Lower Middle, in Access to Justice: Emerging Issues and Perspective 169 , Vol. III of the Florence Access-to-Justice Project Series, M. Cappelletti & B. Garth eds., 1979); 169, Vol. III of the Florence Access-to-Justice Project Series.

12. The 1977 decision of the U.S. Supreme Court, in Bates v. State Bar of Arizona, 433 U.S. 350 began the movement away from prohibiting lawyers' advertising in the United States - a development which has gradually taken hold in Canada. Lawyer advertising has the potential to reduce legal prices and to increase public awareness and understanding of legal services. Although advertising has not been generally undertaken by the "elite" large law firm, it has assisted the development of private legal clinics in the United States and particularly stimulated the growth of several firms with a large number of smaller, clinic-style offices.

13. C. Wydrzynski, "The Development of Prepaid Legal Services in Canada", in Evans and Trebilcock, Lawyers and the Consumer Interest, Butterworths, 1982. Legal services plans are designed to create a risk and cost sharing or spreading arrangement on the premise of " collective acquisition of legal services to benefit the whole". See also Wydrzynski, "Access to Legal Services - Prepaid Legal Services", unpublished paper presented at 1987, Conference of Canadian Law and Society Association, Hamilton, at 4.

14. B. Winter, "More Workers Gaining Prepaid Legal Insurance, 68 American Bar Association Journal 1982 at 1559. In September 1982, Hyatt Legal Services agreed to provide prepaid legal insurance to the Sheet Metal Workers International Association covering over 6,000 sheet metal workers and their families.

15. J. S. Taub, "New Customers for the Law", 1984 4 California Lawyer at 16.

16. F. H. Zemans, Osgoode Hall Law Journal (1988) forthcoming. Similarly, Taub suggests that one of the reasons that there has been such a significant increase in the growth of legal services plans in the US was that "they might create a better public image and more business for the increasing numbers of American lawyers. See Taub, Supra. note 16, at 16 who writes:

Not long ago, you had to be a member of major labour union to be eligible for a prepaid legal services plan. In recent years, however, the number of available plans has increased significantly, and another major expansion is imminent. Those who market legal services plans are going after the individual consumer--and if their plans sell, attorneys may gain not only more business, but also a better public image.

17. Supra. note 12, C. Wydrzynski, "Access to Legal Services-Prepaid Legal Services", unpublished paper, 1987 at 3.

18. I have detailed the confrontation between the Law Society and the CAW Legal Services Plan elsewhere. It is significant that by November 1985, the Treasurer of the Law Society of Upper Canada wrote to the originators of the CAW plan and to the legal profession stating that participation in the plan might constitute unprofessional conduct. See letter from Pierre Genest to UAW Canadian Legal Services Plan, November 1st, 1985 which was circulated to all lawyers on the rolls of the Law Society of Upper Canada. A press report, later in 1985 noted that lawyers could be "suspended or disbarred from practice where such conduct is found". See Inside Business, December 28th, 1985.

19. This data was received in correspondence from the Executive Director of CAW Legal Services Plan to the writer, dated June 7, 1988. Usage is calculated as follows: $100/1 \times (\text{number of active employees} + \text{number of retirees}) / \text{number cases opened per years} = \text{usage \%}$.

20. Although the caseload is higher during the first quarter of 1988 as is the utilization of staff lawyers, the figures are similar to the first quarter 1987 when staff lawyers received 54.3% of the cases and non-cooperating lawyers 21.7%. Similarly usage rates were higher during the first quarter of 1987 at 49.2% as compared to 50.1% for 1988. The significance of the increased utilization during the first months of the year as well as the choice of staff lawyers with increased caseloads awaits further

research and analysis.

CAW Legal Services Plan is operating seven staff office - six in Ontario and one in Quebec. As of June 1988 there are a total of 109 employees, 30 of whom are lawyers. Only two lawyers are involved with administration at the head office - 28 lawyers are located in the seven staff offices.

21. During the first fifteen months of its operation 52,000 files were opened and more than half of all eligible employees utilized the services of the plan. The average annual usage rather has been greater than the similar plans for autoworkers in the United States which currently average about 38%

22. M. Crawford "Break Out in Upper Canada", 10 Canadian Lawyer (1986), 4 at 22.

23. Ibid.

24. See Canadian Bar Association 1987 study of legal aid services in Canada.

25. Supra. note 18 at 5.

26. See The Justice System: Improved Program Delivery, 1985 at 202, where in a discussion of the Federal government's responsibilities with respect to legal aid the authors of the study write:

In the case of the working poor, consideration should be given to whether a form of government-subsidized prepaid legal services might be adapted to meet their legal needs.

27. D. Majury "Into the Era of Prepaid Legal Services", (1981) 5 Canadian Community Law Journal at 46.

28. Canadian Bar Association-National Legal Aid Liason Committee, "The Provision of Legal Aid Services in Canada", 1985 at 1.

29. Supra. note 4, at 11.

30. In constant dollars, per capita expenditures on legal aid rose from \$7.19 in 1981-82 to \$7.36 in 1982-83; to \$7.43 in 1983-84 to fall back to \$7.22 in 1984-85.

31. 1984-85 per capita expenditures on legal aid ranged from Eastern provincial lows of: P.E.I. at \$1.55; Newfoundland of \$2.43; New Brunswick \$2.81; and Nova Scotia of \$4.12; to Central Canada above the national average with Quebec at \$9.17; Ontario at \$7.77 and Manitoba at \$7.79; and the Prairie Provinces slightly below the national average: Saskatchewan at \$5.85; Alberta at \$4.90 and British Columbia at \$5.76.

32. Supra. note 30 at 198-200, Study Team Report to the Task Force on Program Review. Federal-provincial agreement respecting the provision of criminal legal aid have been in place since 1972-73. Essentially the agreements required the "provincial agency" to provide legal aid to eligible applicants in all serious criminal cases --all indictable offenses or in summary conviction matters where there is likelihood of imprisonment or loss of means of earning a livelihood. Criminal legal aid cost delivered by the provinces have grown from \$11 million in 1973/74 to approximately \$90 million in 1985/86.

33. The provinces seek 50/50 open-ended, cost-sharing in all areas of legal aid in view that the federal government should "share the risk" in meeting the demand for legal aid services created by the mandatory coverage requirements in the federal-provincial agreement.

34. Canadian Bar Association, The Provision of Legal Aid Services in Canada, at 200. The Report notes the open-ended basis of the CAP funding of civil legal aid and expresses concern about the open-ended funding of provincial civil legal aid without any significant increase in service.

35. Ibid. at 20. The Report underlines that there are currently three standing legal aid cost sharing arrangement between the provincial and federal governments: the adult criminal and Young Offenders Act agreement negotiated by the Federal Justice Department with the Provincial Ministries of the Attorney-General; the Canada Assistance Plan (C.A.P), under which the Federal Department of Health and Welfare has agreed to cost share civil legal aid provided to those qualifying under provincial social welfare eligibility criteria.

36. Ibid. at 20-21.

37. Canadian Bar Association Standing Committee, National Legal Aid Liaison Committee, Legal Aid Delivery Models: A Discussion Paper, at 33.

38. See Stephen Wexler, "Practicing Law For Poor People", 79 Yale L.J. (1970) at 1049.

39. In these provinces private lawyer participation is generally restricted to mandated choice-of-counsel required in capital cases and occasionally in conflict situations. Saskatchewan and Nova Scotia have plans administered under a public legal aid commission, dominated by government appointees, whereas P.E.I.'s plan is administered through the Department of Justice

40. In Manitoba and British Columbia, a mixed delivery system of judicare and staff lawyers exist with 70 to 75 per cent of the cases handled by private lawyers. The B.C. model reflects its historical and structural origins, a carefully-balanced merger of the Legal Aid Society and the Legal Services Commission under the umbrella of the Legal Services Society of British Columbia. The Manitoba scheme has evolved in response to the changing political scenery of the province. The Legal Services Commission of British Columbia's is evenly balanced between law society and government nominees, whereas Manitoba's plan, under the N.D.P. provincial government had government nominees predominate.

The Quebec mixture of cases handled by salaried to private lawyers is an outgrowth of the plan's emphasis on salaried lawyers working in local and regional bureaux. The Newfoundland mixture appears to have resulted from financial factors. See Legal Aid Models: A Discussion Paper, at 16 to 18.

41. The British Columbia study analyzed the cost of delivering criminal legal services under a salaried public defender system and concluded that there was little difference in per unit cost of services whether provided by a salaried lawyer or through a fee-for-services using lawyers in private practice. In contrast a the 1982, Evaluation de l'Aide Juridique confirmed the cost effectiveness of the salaried model which handled over two thirds of the case load.

The 1983 Nova Scotia Legal Aid Evaluation Report found that the average cost per case during 1981-82 was 143% higher for cases referred to the private bar over those taken by staff lawyers. This examples, however illustrates some of the problems that arise from this kind of comparison. For one thing, it gives no indication of what kind of cases were referred - which could have a significant impact on the actual case cost. Furthermore, only two per cent of the cases were referred to private lawyers, thus rendering the two models virtually incomparable. See Canadian Bar Association, 1987 at 35.

42. Legal Aid in Manitoba (1987) at 211-9 and at 82-6. The Manitoba evaluation found clients who were self-described "winners" rates private Bar lawyers more highly than staff lawyers or quality-of-service indicators, while "losers" were less critical generally of their staff lawyers than they were of their private Bar counterparts.

43. The evaluator explained this differential by referring to the different attitude of private lawyers who were perceived to have a tendency to "hand hold" their clients taking care of even their non-legal needs, thus engaging in "strategic billing" treating the tariff as a minimum bill:

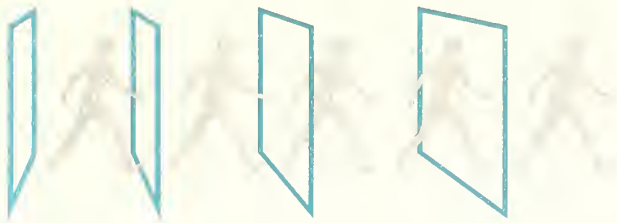
In the consultation phase, lawyers indicated that appeasing clients and keeping them calm resulted both in satisfaction of the client and in a better representation ... it is being suggested here that "babysitting" or "hand holding" of clients is an inherent ingredient in private practice, but is a less common feature of the practices of staff lawyers.

44. See Canadian Bar Association study, 1987 at 46-47. It is particularly in high volume cases that the staff lawyer has an opportunity to take advantage of the economics of specialization. The average experience for staff lawyers in Manitoba is nine years in practice, thus giving ample opportunity to develop specialized knowledge and experience. This advantage is magnified by the fact that staff casework is divided by department into areas of expertise.

45. M.J. Mossman, Legal Aid in Canada (unpublished) at 56.

46. The proposed evaluation of the Ontario Legal Aid Plan should give considerable insight into the judicare side of the plan, Unfortunately very little research is being conducted in the first evaluation of the Ontario plan to allow for real comparison between the clinics and private bar.

The writer is currently conducting a qualitative study of four Ontario community-based legal clinics which analyzes the clinics' case work, law reform and community development work in terms of impact on their particular community.



Conference
on Access to
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Congrès sur
l'accès à la
justice civile

**VARIETIES OF MEDIATION PERFORMANCE:
REPLICATING DIFFERENCES IN ACCESS TO JUSTICE**

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Conference on Access to Civil Justice
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Toronto

Executive Summary

VARIETIES OF MEDIATION PERFORMANCE: REPLICATING DIFFERENCES IN ACCESS TO JUSTICE

Sally Merry explains the nature of alternative strategies to litigation (ADR) and its history in the United States. She lists the perceived advantages of such alternatives -- more efficient, humane, responsive, expeditious, flexible, points to the high level of user satisfaction, and comments on their effectiveness in reducing court congestion and delay. Also, she connects this tread with its political roots and states how ADR unites community activists with conservative legal elites.

She reminds us, however, that there has been strong opposition to such a trend of ADR. In particular, the criticism has been made that ADR produces a two-tier system which dispenses second class justice to the poor, minorities, and other disadvantaged groups. Also, she considers the argument that informal mechanisms actually extend state power through non-state means. To assess these claims, she insists on the importance of disentangling the very different processes which are too easily lumped together as ADR. Whereas those processes that work at the bottom end of the market are open to stiff criticism, those that serve the top end of the market are not. To illustrate and prove her point, she examines the functioning of two different kinds of mediation for interpersonal disputes and private mediation for corporate and commercial matters.

She concludes that, even though superficially similar in structure, they work differently in practice: "Shakespeare in the high school gym is a different performance from a production in a London theater". Citing extensive international and interdisciplinary studies, she notes the differentials in choice and access. In particular, she concludes that, over time, the formal system of civil justice will penetrate and shape its newer, informal alternative in its own image and interests. Access to each is very similar and conditional on the same considerations -- power and class are replicated from the old into the new. She calls for a more discriminating and selective treatment of ADR in Canada than is presently underway in the United States.

Aboriginal Commission to Resolve Disputes of a Civil Public Law Nature

More and more there are disputes of a public law nature coming before the courts. These disputes are of many varieties but usually include an aboriginal right on the one hand which will affect some Canadian right on the other hand; this may include questions of aboriginal title, interpretation of treaties, reserve lands, questions of breach of the Federal Government's fiduciary responsibility, hunting and fishing rights, educational rights etc. Some of these issues are of such fundamental importance as to be impediments when the respective aboriginal peoples and governments attempt to settle these disputes through negotiation; they are issues which only the Courts can settle. So the question is how can this process become more cost effective, appear to be less biased and therefore more accessible to aboriginal peoples?

Secondly, there are many situations where the parties recognize that aboriginal rights exist, but there is a question as to the definition of these rights. Aboriginal people feel they cannot access the Courts because they cannot afford the cost of a trial. They do not trust the court to resolve their dispute in an equitable manner; and the governments can drag the dispute through the Courts for years. Should these disputes be settled through some para-court forum which has the expertise to effectively resolve these disputes?

The most obvious measure to be taken in giving aboriginal peoples access to a civil dispute resolution forum, where there are specific rights to be defined, is to establish a forum which: has the expertise, staff and facilities; is cost efficient; is trusted by all parties; and has the mandate to effect the resolution of the dispute.

Other countries have recognized that the general courts may be inaccessible to

aboriginal people and have undertaken different initiatives to solve this problem. It is useful to look at how these forums operate and whether they are forums which Canada might consider.

New Zealand's Waitangi Tribunal

The Waitangi Tribunal is a unique institution for resolving disputes between indigenous peoples and government. The uniqueness lies in the structures and process of the Tribunal.

The Tribunal essentially deals with questions of interpretation of the Treaty of Waitangi which was signed on February 6, 1840. Unlike the Canadian experience it was the only "Treaty" entered into by the Maori. It dealt with the sovereign rights of the Maori and recognized pre-existing land rights of the Maori. Both historically and currently, the Treaty is considered by the Maori as the primary articulation of their rights; it has provided the sole framework within which Maori land, land use, cultural and political rights have been advanced by the tribes in the Courts and the political arena.

There have been some problems with the Waitangi Treaty. First, there are Maori and English versions of the Treaty, and they are not exact translations of one another. Second, the part of the Treaty dealing with the political relationship of the Maoris and New Zealanders, is general and conceptual. Third, the Treaty was signed by tribal chiefs and confirmed the property rights of the tribes with a crown right of pre-emption. Shortly after the Treaty was signed, New Zealand passed land legislation focussing on individual Maori ownership and systematically undercut tribal control. So the question was, how were the clear words of the

Treaty now to be understood, after a century and a half of laws designed to reduce the Maori land base and tribal control?

While the Treaty of Waitangi contains a comprehensive statement of Maori rights the Courts have given it very little legal force. In large part this negative response by the courts forced the creation of the alternative mechanism called The Waitangi Tribunal. In 1975, The Treaty of Waitangi Act established the Tribunal to "determine its meaning and effect....". Legally, the Tribunal remains advisory only. Politically it has become the authoritative body to interpret Maori rights.

The functions of the Tribunal are:

S.5(1)(a) "To inquire into and make recommendation upon, in accordance with Section 6 of the Act, any claim submitted to the Tribunal under that Section":

S.5(1)(b) "To examine and report on, in accordance with S. 8 of this Act, any proposed legislation referred to the Tribunal under that Section".

In recognition of the Tribunal's expertise, the Act accords a measure of protection to the Tribunal in the exercise of its functions. Section 5(2) states:

S.5(2) "...for the purposes of this Act, the Tribunal shall have exclusive jurisdiction to determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them".

It allows Parliament to refer proposed legislation to the Tribunal (S.5,6,8) and for the Tribunal to determine whether the legislation complies with Treaty principles. Any Maori or group of Maoris can make a complaint to the Tribunal if he, she or they can prove:

(1) prejudicial effect or likely prejudicial effect;

- (2) due to some executive or legislative action or omission;
- (3) the act or omission is inconsistent with the principles of the Treaty as defined by the Tribunal.

In its first two decisions, the Tribunal interpreted the Treaty in a very narrow manner and for the next few years Maoris felt the Tribunal was irrelevant. This changed in 1981, under the new leadership of Chief Judge E. T. Durie, a Maori. In the Motuni claim, the Tribunal discussed the Treaty in expansive terms. Since then, it has continued to adopt this very pro-active style; giving its view wherever possible, of the framework which the Treaty offers for ordering the relations, on a broad scale, between the two peoples. In their view it offers a blueprint for the future development of New Zealand.

Claimants have also seen the Tribunal as equipped to deal with not just legal issues but social policy issues. The Tribunal has been able to assume such a role because of both the ambiguity and symbolism of the Treaty itself and because S. 6(1) of the Waitangi Act requires it to apply the Treaty's underlying principles and not necessarily its strict wording. The important point is that the Tribunal is perceived by the Maori people not just as a quasi-judicial body but as a vehicle for achieving change in social policy as well.

On the negative side, a perceived limitation is that the Government of New Zealand can reject the recommendations of the Tribunal. The reason why the Tribunal has been successful is that it has the power-base of public opinion behind it on most occasions. As a result the Tribunal's reports and recommendations have been willing to dilute Treaty rights in order to reach what the Tribunal calls a "practical solution", but which in reality is a politically palatable solution. This may be a somewhat dangerous practice because the mainstream Courts are

increasingly looking to these reports for guidance on interpretation; the versions may be inaccurate for reasons unrelated to the Treaty.

On the positive side, the Tribunal exercises a degree of procedural and substantive freedom which it would not have if it were a final decision-making body. The Chairman of the Tribunal is of the opinion that if its decisions were made enforceable in and of themselves, the Tribunal would feel more constrained to take a more legalistic and court-like approach.

In looking at why the Tribunal has been successful one might conclude:

- (1) It has been a successful dispute resolution model because of the negative legal environment which preceded its establishment; it is a very positive institution in a near vacuum;
- (2) It has achieved a level of credibility in the Maori world unparalleled; clearly it is a body sensitive to Maori concerns and knowledgeable of Maori cultural perspectives;
- (3) It has been instrumental in helping to define a place in New Zealand legal and political order for the Treaty of Waitangi.

The Tribunal is seen as in the middle of being a facilitative forum and a final decision forum. Because it is in between these positions it can take advantage of all three approaches.

On the negative side the Tribunal must rely on public sympathy and as a result there may be the dilution of Treaty rights. On the positive side however, is the freedom not accorded the final arbiter, to make creative use of rules of procedure and substantive issues.

The Indian Commission of Ontario

The Commission of Ontario was established in 1978 through a tripartite agreement, to assist Canada, Ontario, and First Nations to identify, clarify, negotiate and resolve issues which the parties feel are of mutual concern. Its function is to:

- (1) prepare the agenda for meetings of the parties,
- (2) keep independent formal records of the meetings;
- (3) provide a neutral chair for meetings and help them to run smoothly.

It has the following powers: (in some instances the consent of parties is required for the power to be exercised)

(1) Convening of Meetings:

The Commission has the power and authority to convene meetings upon reasonable notice and to adjourn them, including the power to convene a meeting at its sole discretion for the purpose of considering an urgent matter.

(2) Appointment of Chairpersons:

The Commission may appoint chairpersons for meetings other than those of the Tripartite Council. Council meetings are chaired by the Commissioner.

(3) Production of Documents:

The Commission may require the representatives of any party to deliver to the Commission, any relevant documents; information available to that party, which is not privileged as defined in the Access to Information Act; or to make available any person in a party's employ for the purpose of

assisting the Commission in the resolution of an issue.

(4) Suspension of a Process:

The Commission may after consultation with the parties, suspend any of the Tripartite processes.

(5) Setting of Deadlines:

The parties have provided the Commission with authority, after consultation with the parties, to impose deadlines for the completion of any process, to set questions and to request responses from the parties and, in consultation with the party concerned, set a reasonable time period for receipt of the response.

(6) Determining and Resolving an Impasse:

On the application of a party to a matter before the Commission , the Commission may determine whether an impasse has occurred, and if so, require the parties to attend one mediation or other meeting to attempt to resolve the impasse or to consider alternative dispute resolution mechanisms.

(7) Mediating or Arbitrating:

With the agreement of the Parties to a matter, which has been referred to the Commission for examination and resolution, the Commission may act as, or arrange for, a mediator or arbitrator in and of any issue or any element of any issue.

(8) Facilitating a Reference of an Issue:

The Commission may, with the consent of the Tripartite Council, refer any issue to a court, tribunal, body or person.

(9) Recommending an Inquiry:

The Commission may recommend to the Tripartite Council the appointment of a Commission under the Inquiries Act or other legislation to inquire into such matters as the Commission considers necessary.

The principles which underlie the Tripartite process are:

1. Discussions are to be held at the highest levels of decision making;
2. An important safeguard in this process of creating constructive change is that no one can impose anything on another party without its consent;
3. Once an agreement is reached all parties are committed to it and take responsibility for its successful implementation;
4. Each of the parties participates in negotiations on an equal footing.
5. For each issue only those parties appropriate to that issue are involved.

Council consists of all of the chiefs of the First Nations of Ontario, a representative of the Federal Cabinet and a representative of the Provincial Cabinet; meetings of the Council are chaired by the Commissioner, Roberta Jamieson.

Any member of the Tripartite Council can propose that an issue be resolved through the Tripartite process. The issue must be sufficiently defined so that the parties can determine whether it should be accepted for negotiation. It must meet three conditions: (1) it must be of mutual concern; (2) the parties must agree that the process facilitated by the commission is the best way to resolve it; and (3) the Commission must agree that it can assist the parties to reach an agreement.

Once accepted for resolution and the Commission becomes involved, the parties to the resolution of the issue are asked to appoint representatives chaired by the Commission. At an initial meeting(s) preliminary matters are dealt with i.e.

procedure, terms of reference, mandates required, time frame, resources required by the parties to participate etc.

Negotiations then begin. It is here that the Commission actively takes a part in facilitating the parties toward agreement. The Commission also keeps formal records. When the representatives have reached an agreement, a formal agreement is then signed by the Ministers and the Chief(s) involved. The parties then take the appropriate steps to implement the agreement. Issues may also be resolved through mediation (reconcile differences) or arbitration. The Commission may also, by agreement of the parties involved, resolve claims filed by First Nations in Ontario, in a defined process, facilitated by the Commission. Currently eight claims are in the process of being resolved.

The advantages of this type of model are:

- (1) all parties participate on an equal footing - in the past the unequal power has been a serious handicap;
- (2) The procedures are flexible enough that it encourages rather than discourages resolution of disputes;
- (3) the process has been educational for all parties to the extent that First Nations are beginning to feel that Governments are now understanding them better.
- (4) The parties to the dispute decide the outcome;
- (5) The Commission has developed an expertise which is necessary to the resolution of disputes which were previously too complicated;
- (6) The process is very efficient;
- (7) The entire issue need not be resolved.

The disadvantages to this process:

- (1) The Federal and/or the Provincial Government can still refuse to resolve an issue;
- (2) With land claims, the Federal Government is still in a conflict of interest; it has the ability, through the Department of Justice of determining whether the claim is valid.

The Australian Aboriginal Land Commission

In 1976, Australia, under the authority of the Aboriginal Land Rights (Northern Territory) Act, 1976, statutes of Australia, No. 191 established the Aboriginal Land Commissioner (a judge) to hear and make recommendations on claims to Crown lands, on the basis of traditional rights.

Section 50 of the Act gives the Commissioner the authority to hear an application. Section 50(1)(a) states:

..."by or on behalf of Aboriginals claiming to have a traditional land claim to an area of land, being unalienated Crown land or alienated Crown land in which all estates or interests not held by the Crown are held by or on behalf of Aboriginals."

The Commissioner then has two functions (1) to decide claims to unalienated Crown lands on the basis of traditional rights, and (2) to enquire into the likely extent of traditional claims to alienated Crown lands and report to the minister from time to time.

In determining whether the aboriginal claim is valid, the Commissioner hears evidence along the lines of conventional court proceedings, although with less formality. The hearings are usually public and are often held at the claim site;

hearsay evidence can be admitted. While the Commissioner is required to be a Judge, he does not make a final ruling but only a recommendation to the Minister of Aboriginal Affairs. The Commissioner is to decide on the basis of certain formally stated criteria and then consider certain balancing factors which suggest political or policy considerations ,S.50(3)..

As a result of the Commissioner's work, substantial parts of the Northern Territory of Australia has become inalienable land held by aboriginal tribes.

Advantages of this Forum

The Australian experience has some advantages. First it is both innovative and flexible; it is both legal and also a special tribunal. It represents a major adaptation of the Court process to a statutorily defined land claims process. Second, the Commissioner goes to the aboriginal communities, relying on them as primary witnesses. Third, claims are usually heard and determined very quickly.

Disadvantages of this Forum

The disadvantage to this forum is that the Commissioner can only make recommendations to the Minister. It is still up to the Minister to make the final decision.

Recommendations

There are three recommendations which seem to flow from the above analysis, and the fact that specific, and general claims are increasing.

First, it would seem that some special forum should be created to handle the ever increasing number of claims. There is enough experience by other countries to tell us what will work and what will not work. I would suggest that the following

should be considered:

- (1) Whether this forum should be a final dispute resolution forum; in the nature of recommending forum or a facilitative function. There are advantages to having all three processes available to the special tribunal. This could certainly be done but there would have to be minimum requirements for the use of each method. At a minimum where parties are really entrenched in their position you might want to give the tribunal the authority to decide whether the claimant has a claim which should be dealt with. An independent tribunal represented by the unbiased people with expertise in this area would be much more acceptable than the present court system. Once this initial stage was reached, the parties could then decide whether they wanted to negotiate; let the tribunal carry on and facilitate an agreement or agree to arbitration by the tribunal.
- (2) Secondly, it would also seem that all of the above forums indicated a willingness to be less legalistic in procedure and evidence. This is essential, in my view, if aboriginal rights are to be equitably resolved.
- (3) There should be some reporting requirement. I would suggest that the tribunal be required to report to the Parliament of Canada so that all Canadians would be aware of what recommendations were made, what agreements had been reached or what final decisions had been made and that this be in the form of an annual report.

It would also appear that some aboriginal rights cases will continue to be heard by the civil court system. It would seem, that being the case, that there should be more emphasis placed on educating the legal profession, Judges and the public in relation to the law as it specifically applies to aboriginal people in Canada and their special statutes.

Third, it would appear that it is in everyones best interest to have some of these critical issues, i.e. the fundamental issues, thoroughly researched and then specifically litigated in the civil court system. That being the case, it makes eminent sense to establish a centre for researching and litigating these kinds of issues. This would provide the much needed access to the civil justice system for aboriginal people and indeed non-aboriginal people in Canada.

system, he to wants to replace it. His solution is a form of judicial intervention employing an approach to law making that relies on reason rather than pluralist bargaining. Sunnstein questions the model of government as the aggregation of individual preferences, and offers in its place a "republican" ideal that seeks to develop normative theories of the common good. These theories, he asserts, can and are developed by the judiciary who will ensure that only laws enacted through reasoned judgment based on notions of the common good will be enacted. With the judiciary playing such a role, the need for surrogate representation would disappear. This approach not only undermines the rationale for traditional, surrogacy-based public interest law representation. It also makes a more radical version of the public interest law idea, based on direct political action, seem unnecessary. Some public interest law theorists, disillusioned by the limits of the surrogacy idea, have turned to direct political organization as a more effective and democratic way to increase the voice of the unrepresented. But if this kind of interest aggregation and bargaining is undesirable, such activities would seem unnecessary at best.

One theme struck by Stewart and other neo-conservative legal theorists who have addressed some of the access to justice reforms is a distrust of bureaucracy. It is important to note that the access to justice movement largely took bureaucracy for granted. Bureaucratic decisions were necessary for the operation of the welfare-regulatory state which the access to justice movement sought to perfect. Access theorists recognized that

bureaucratic decisions were "open" to a variety of influences, and that the micro-politics of administrative decision-making had a crucial impact on the nature and effect of the rights they sought to perfect. Public interest law was a method to cure a flaw in this system, not by replacing it, but by adding surrogate representatives for interests without group representation.

The theme of bureaucratic distrust has been taken up by left theorists as well in the post-access to justice period. Some public interest practitioners have come to believe that surrogate representation is an ineffective route for ensuring the participation of client groups. There are many problems with the surrogate model. First, the idea has met stiff resistance from the bureaucracies themselves, who see in the critique of their operations a threat to their own claim to speak for the "public interest." Second, even when the bureaucracies are prepared to accept surrogacy, the surrogate representatives find that their resources are woefully inadequate to the task they have accepted, and their token efforts often legitimate a bad situation rather than transforming it. Finally, the push for surrogacy replaces grass roots mobilization and tends to create pseudo-spokespersons whose contact with the people they claim to represent is limited at best. As a result, some public interest practitioners have begun to question the goal of perfecting existing bureaucratic systems and have begun to search for more radical solutions in which the advocate's role is not to speak for groups but to help them speak for themselves. (L. Trubek, 1988).

4. The Second Critical Moment: ADR and the Redefinition of the Self

The movement for access to justice is associated with a second, perhaps more basic, critical moment in American legal thought. This is the effort to rethink the liberal concept of the self. While public interest law and legal services for the poor helped explode narrow ideas of the nature of law and the role of lawyers, they did not question liberalism's account of the self or its basic notion of the relationship between law and empowerment. The move for alternative dispute resolution fora, however, included some strands that did question liberalism's individualistic, rights-based notion of self-empowerment. In the past decade these tendencies within the area of procedural reform have been strengthened by theoretical developments outside law and within legal theory. As a result, a new theoretical debate has emerged which influences ideas about institutions and institutional reform.

The Alternative Dispute Resolution (ADR) movement in the United States is highly heterogeneous. It includes people who want to find more efficient ways to resolve business disputes among major corporations, and those who want a way to divert "minor" cases from the civil and criminal courts. For many who champion ADR for these reasons, neither enhanced access or a new vision of the relationship between the law and self-empowerment are of major importance. But there are ADR proponents who have seen the move to alternative fora as ways to make justice more

accessible to the poor and disadvantaged, and some who see in ADR the germs of a radical transformation of ideas about law and justice.

There is nothing particularly new or necessarily transformative in the idea that simplified procedures will make civil justice more accessible. Once it became clear that liberalism's claim to equal justice was undermined by the costs of using the system, proceduralists have looked for ways to lower the costs of litigation as well as for methods of subsidizing the costs for those of moderate means. In this perspective, small claims courts and other informal dispute resolution mechanisms are the other side of the legal aid coin. You can close the "cost gap" by making justice cheaper or by subsidy. This aspect of the access to justice movement, like legal aid, does not challenge liberalism's individualist notion of the self nor its rights-based view of empowerment. Moreover, the small-claims approach need not embrace a broadened, more "realist" view of law and the lawyer's role.

But there is a more critical dimension to some of recent thinking on the relationship between ADR and access to justice. These strands became important in the United States in the 1970s. While they have had only limited influence on legal institutions and legal theory, they represent the second moment at which proponents of access to justice found themselves allied with those who sought to transform basic theories about law.

While some who championed ADR had rather modest goals in mind, others saw in the movement for alternative fora possibilities for greater community, new sources of law, and a different understanding of self-empowerment. For these radical voices, what was wrong with traditional civil procedure was not just its monetary costs, but the fact that it presumed that the enforcement of legally defined rights was both necessary and sufficient to ensure self-empowerment. They sought procedures which would both employ and develop community norms and values, allow the development of normative agreement through open dialog, and be sensitive to the importance of relationships in the maintenance and enhancement of the self.

Critics of this stripe saw legal procedure as alien and alienating. Legal procedures suffered from innumerable flaws that could not be corrected either by simplification or subsidy. First, legal justice isolated individual claims, thus deterring collective struggle of a more direct and political nature. Second, legal procedure destroyed, rather than rebuilt, valuable relationships. Adversarial processes aggravated conflicts. The winner-take-all feature of civil law meant that compromise was difficult if not impossible. Third, legal decision making relied on abstract norms drawn from an (allegedly) determinate corpus of universal principles and rules, rather than employing values and normative understandings drawn from the innumerable, diverse communities in which individual lives are embedded or mutually constructed in dialogic situations. Fourth, law is insensitive to individual needs. It must force disputes into

pre-selected categories and stereotyped fact situations. Fifth, legal justice is backward looking and judgmental, not forward looking and reparative.

Those who saw these flaws in traditional civil justice sought "alternative" fora that would permit more attention to the relationships people were embedded in and the communities they were a part of. At the same time they looked for fora which were more sensitive to individual concerns and needs. They wanted institutions that would be able to grasp the full nature of the dispute, allow people to express their real concerns rather than channel disputes into legal categories, and seek solutions that were acceptable to all participants. They wanted law to become more sensitive to the individual, to relationships, and to communities.

It is clear that this version of ADR and the critique associated with it contained a challenge to the liberal notions of self and empowerment that are deeply embedded in our theories of civil procedure and the procedural institutions they explain and justify. Proponents of this approach to ADR tend to stress the relational nature of the self, rather than seeing the self as fully-constituted prior to interaction with others. From this perspective, to empower the self is to facilitate and strengthen the relationships and communities within which the self is both defined and sustained. But at the same time the goal is to recognize the constructed nature of these relationships and to foster processes by which self-aware individuals construct and

reconstruct relationships within communities whose norms are always open for reinterpretation.

It is no wonder that community-based mediation was one ideal of this movement. Mediation seemed much more likely simultaneously to bring out deep individual concerns, allow free use of community norms, and encourage dialogical construction and reconstruction of relationships. And given the communitarian strand in this ADR vision, it is easy to see how its proponents would look to mediators from the "community" in which the disputants were situated.

It is difficult to trace all the impacts of ADR on legal theory. In the first place, as I have noted, many different ideas about law and society have marched under the slogan of ADR. Some have had more impact on institutions than others. Second, even if we focus on one of these strands of thought, like the more radical, communitarian notions associated with community mediation, it is hard to isolate the relative impact of the ADR related arguments and other strands of critical thought. If we look at the critique of the liberal idea of self empowerment seen in the community mediation movement, we see that it parallels arguments made in political theory (Sandel, 1982) and in various critical legal theories, including the work of the critical legal studies movement and certain aspects of feminist thought (See Handler, 1988). Finally, while the definition of law that accompanied the first critical moment in access to justice theory can be said to be widely accepted, the theoretical shifts

suggested by a communitarian vision of ADR are hotly contested and the struggle is on-going.

Nonetheless, the terrain of legal theory has been altered to a significant degree, and the ADR arguments have had an impact. By tying very general theoretical concerns found in many discourses within and without the law to a concrete program of institutional change, the community mediation movement strengthened the counter-theory project. Thus they have helped raise the salience of more abstract critiques of the liberal model of law and society, and the liberal vision of self-empowerment. They have also generated counter-counter visions, as various legal theorists reacted to the challenge that the critical counter-vision poses to law's understanding of itself. As in the earlier critical moment so with ADR the impact of an access-to-justice argument on legal theory has changed the debate, but has not led to an consensus on basic questions or on desirable institutional reforms.

As Silbey and Sarat have suggested (1988), there are numerous arguments on the theoretical scene generated by ADR, each associated with very different institutional projects. Among these are a legalist reaction to any use of ADR, an effort to redefine ADR as a therapeutic practice, and the radical communitarianism I have already noted.

Some proceduralists have attacked all aspects of the ADR movement. They see in it a threat to the notion of rights and to the proper role of courts. From this perspective, the efforts of

ADR proponents to foster more consensual settlement of disputes through mediation and other techniques will erode the protections rights provide for individuals and groups, encouraging efforts to "cool-out" claims based on notions of right. Moreover, by encouraging the settlement, rather than adjudication, of major controversies involving important public values, ADR will deter the process of reasoned elaboration of legal norms which is the unique province of the courts and which these legal commentators see as essential for a system of ordered liberty. In their view, civil rights are essential for democracy, civil procedure necessary to elaborate the nature of these rights and enforce them against those individuals and entities who threaten their fulfillment. For them any move that would remove such cases from the courts, or encourage the settlement rather than full adjudication, undermines liberty: ADR poses just such a threat.

A second position in the debate accepts ADR as a highly desirable innovation, and sees in the move to ADR a way to replace rights-based decision-making by legal professionals with therapeutic interventions by persons trained in the helping sciences. People who espouse this position accept much of the critique of legal justice which was developed by those who promote community mediation (See Fineman, 1988). But unlike the communitarians, they seek to replace legal justice with procedures that rely on skilled professionals with training in behavioral sciences. The argument behind this position is that most disputes we consider legal have at their core interpersonal conflicts which can be diminished and even resolved through forms

of professional intervention inspired by such disciplines as psychology and social work.

Proponents of therapeutic dispute resolution, like the communitarians, favor mediation over adjudication, settlement through bargaining over imposed solutions laid down by authoritative third parties. But unlike the communitarians, they look to professional expertise, not community norms and interactive dialog, as the key to dispute resolution. As Silbey and Sarat (1988) point out, they seek to redefine the purpose of law from protection of rights to fulfillment of needs.

A needs-based approach to justice has appeal to many. It seems to be better able than legal justice to deal with the complexities of particular conflicts, and to be more responsive to individual concerns. In this sense it seems to promise truer or more fundamental self-empowerment than liberal legalism. But as critics of this approach point out, the move to a needs-based, therapeutic approach is fraught with dangers (Silbey and Sarat, 1988; Fineman, 1988). Some see in this move in legal theory the threat of a "Foucauldian nightmare" in which the redefinition of the juridical subject from a rights-carrying individual to a collection of psycho-social needs will empower not the individual but those professionals who claim expertise in determining and satisfying such needs. In this view, the ADR cure may be worse than the diseases of formal, legal justice. In the name of making justice more truly accessible to the individual and more truly responsive to individual needs, ADR may place individuals

in the grip of a new disciplinary technology and a new professional elite.

As I have suggested, in the arena of legal theory the debate sparked by ADR as a means of enhancing access to justice has just begun. The critique of legal justice which is the core of this aspect of the access to justice movement has been rejected by some, and those who embrace it do not share a unitary vision of law, self, and society. Rather, ADR has become another area in which the struggle of competing theoretical visions is being played out. The outcome of these struggles is uncertain, and the impact of any of these positions on concrete institutional reforms indeterminant.

A few points about the institutional scene, however, are worth mentioning. The first is that traditional legal institutions have, to a degree, captured and coopted the ADR movement, employing its rhetoric and some of its ideas to make relatively minor reforms in civil procedure (like the summary jury trial which is very fashionable today) or to create diversion programs to provide mass-processing of "minor claims" (like the widespread use of mandatory arbitration of civil claims in some state and federal courts). These projects have helped relieve some court congestion, but it is questionable whether we have made civil justice more accessible either in monetary or existential terms. And certainly they have no radical or transformative content.

A second point is that legal culture has been basically resistant to either the therapeutic or the communitarian strands of the ADR movement. Some lawyers have attacked therapeutic ADR in the name of liberal legalist values, while pointing to modest changes in civil procedure as cures for the worst flaws in legal justice. And when legal theorists have taken a positive attitude toward ADR reforms of various natures, they have seen them at best as supplements to legal justice, and have largely ignored the more radical implications of the communitarian vision. Whatever radical potential the second critical moment in access-to-justice theory may have for the future, its impact so far has been limited and marginal.

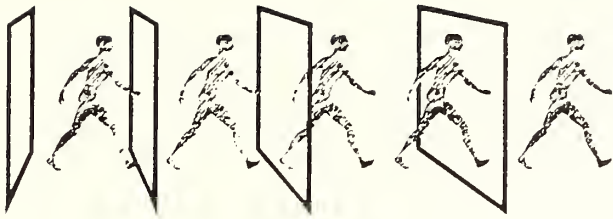
Conclusion

This essay has sought to look not at the institutions which the access-to-justice movement created in the United States, but at the theoretical challenges it produced. I have called these challenges the "quest for the empowered self." In this focus, the important thing about this short-lived moment in American legal culture may be the changes it wrought in our understanding of the nature and purpose of law in general and civil procedure in particular. I have suggested that a common theme throughout the several "waves" of this movement has been an effort to realize law's promise to empower us as social beings. I have tried to show how legal theory has pursued this quest, as various challenges to law's claims to promote justice were raised by critics within and without the law. The quest began when

liberalism's claim to self-empowerment was challenged by those who saw that income disparities made mockery of the idea of equal justice under law. Legal aid seemed, at least in theory, to answer this criticism. But as we began to understand the complexity of enforcing rights in the welfare state, the quest had to be expanded to embrace a broader concept of law and a more expansive notion of practice. Yet even those moves failed to still concerns about the relationship between legal justice and a vision of a society of self-empowered equals. Thus the most recent phase of the quest has been the most radical, because it has questioned the very conceptual underpinnings of the original ideal of legal justice. In the limited and tentative efforts of communitarian proponents of ADR to redefine our ideas about self and empowerment, we may be witnessing not another "wave" of the quest to achieve justice within liberalism, but an effort, however tentative, expand our ideas of self and empowerment, and thus to enrich the theoretical perspective from which institutional innovations will be interpreted and evaluated.

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Conference
on Access to
Civil Justice

Congrès sur
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justice civile

NATIONAL CONFERENCE ON ACCESS TO CIVIL JUSTICE

JACQUES CHAMBERLAND
DEPUTY MINISTER OF JUSTICE
QUEBEC

ACCESS TO CIVIL JUSTICE: THE ALTERNATIVES

We live in a society in which the rights of individuals, corporations and governments continually interact with one another. At any moment an incalculable number of legal relationships are being formed, carried out or dissolved.

What is more, the demand for legal services exceeds the supply that governments are able to provide. The excess of demand over supply leads to line-ups or, in other words, the often long delays suffered by parties in getting a decision from the courts.

To combat this problem and to ensure respect for the rights of citizens unlikely to have recourse to the judicial system, Quebec has chosen to put in place a large number of measures aimed at simplifying the judicial process and alternative measures promoting access to civil justice.

One of the ways that Quebec, like other governments, has adopted to promote access to civil justice has been to apply the principles of operations management, in particular, to avoid bottle-necks by increasing the number of points of access to the system.

Just as supermarkets have installed express checkouts for customers with only a few items to pay for, the province has created a court for claims of less than a thousand dollars - the Small Claims Court. This is one of the most concrete

methods of improving access to justice. This court allows any individual to get a court decision quickly without incurring the costs involved in traditional lawsuits, because in the Small Claims Court the parties represent themselves and court costs are very low.

Moreover, in order to respond to the increase in larger claims, changes have been made to the Code of Civil Procedure and the Rules of Practice. For example, in injunction cases a party may now present evidence by way of detailed affidavits, which speeds up the judicial process. On this point, the Chief Justice of the Superior Court stated at the end of 1987 that there was now ten times less waiting in Superior Court than four years previously. Chief Justice Gold attributed this speed to full disclosure of evidence, and increased use of discovery procedures and affidavit evidence.

These efforts have been fruitful; nevertheless, the demand is becoming ever stronger, calling for imaginative responses to improve access to justice.

The creation of the Small Claims Court and changes to the rules of procedure and practice have improved the situation with delays. We must not underestimate the other problems. The costs of lawsuits before the courts grow higher and higher, forming an unpassable barrier for many litigants not eligible for legal aid. There is also a psychological

problem. Even if delays and costs did not exist, a large number of people are extremely nervous at the very thought of having to appear in front of a judge to claim their rights.

As a result, an individual will often prefer to absorb personally damages caused by actionable behaviour of someone else. Fear of the unknown and the formalities of procedure undoubtedly reduce the number of lawsuits brought before our courts.

For all these reason, we have to find solutions different from those ordinarily used. We have to find solutions that will permit citizens to take charge of their own lives and to resolve on their own the disputes among them, while offering them where necessary the assistance of a third party to help them come to an acceptable solution.

I would like to outline for you the experience of Quebec in these matters.

In areas where disputes have been numerous, the government has established no fault liability programs. Quebeckers now have available to them programs that ensure them of compensation for accidents at work or on the highway.

A worker who is injured on the job will be compensated by the Employment Health and Safety Commission (la Commission de la Sante et de la Securite du Travail) for the injuries suffered, without regard to the person responsible for it. On the other hand, the worker is forbidden to sue the employer who might be responsible for the accident.

Likewise, a person injured in an automobile accident will be compensated by the body responsible for applying the relevant statute and may in no case sue the person responsible for the accident.

These two programs are now well established in Quebec. They respond satisfactorily to the psychological problems as well as the difficulties of costs and delay experienced under the old system. The beneficiaries of the current programs get "justice" that many before them never managed to attain. We in fact had found it necessary to find a method of controlling risks inherent in modern life that were likely to cause injury to any Quebecker, and to ensure adequate compensation for accident victims. Before the introduction of these programs, the victim of an accident at work or on the road was never assured of obtaining compensation. He or she had to bring a lawsuit against the person alleged to be responsible, bring evidence of fault and of damages and persuade the court of both. Even with judgment for the plaintiff, full compensation depended on the solvency of the judgment debtor. The person

causing the damages, on the other hand, received no compensation for his or her own injuries. This situation was simply unfair. Our no-fault liability programs have provided a remedy to these injustices.

The desire to provide access to justice broadly defined has also led us to furnish high quality social services to the population. This response, which one may call social justice, has led us in particular to be interested in problems experienced by young people in need of protection.

We have been trying for several years to de-judicialize our programs for youth. For example, a social worker may be assigned to work with an adolescent and his or her parents to find a solution to behavioural problems that ordinarily would have required the involvement of a judge. The social worker acts in the name of the Director of Youth Protection with a view to making a voluntary agreement with the parents and the child. Such an agreement is, as its name indicates, voluntary and always requires the consent of the parents, though it may be imposed on a child under fourteen. The agreement may contain an undertaking by the parents to take greater responsibility for their child, as well as an undertaking of the child to stop his or her unacceptable behaviour. Such an agreement may involve the child in an undertaking to perform a certain number of hours of community work. I was recently told of a case in which a young man had agreed in this way to

work for free for several hours in a recreational facility. The directors of the facility were so satisfied with the work that they decided to hire him as a monitor for the whole summer. That is the kind of success that impells us to work even harder at de-judicialization.

Quebec has also tried to give consumers the opportunity to obtain justice in their dealings with merchants. The province changed the previous law in order better to protect the interests of consumers both before and after making a contract with a merchant. The Consumer Protection Act has been in force for several years now in Quebec, and its effects have been very beneficial. The Act has permitted the creation of a proper environment for the prevention of consumer problems. Particular sections of the Act deal with contracts made with itinerant sellers, contracts of credit, contracts for the sale and repair of automobiles, contracts for personal services such as dance classes or continuing education courses, as well as with improper business practices.

In the case of itinerant sellers, the Act requires the merchant to use a contract spelling out the rights of the consumer, prohibits the taking of a payment from the consumer before the end of the cooling off period, and gives the consumer the right to back out of a contract for ten days after it is made. The Act thus allows the consumer who makes a contract under pressure to have the contract cancelled without having to go to court to do so.

To prevent abuses and to discourage those that do occur, the Act contains a special part on unlawful business practices. False advertising, misrepresentations and a number of traps for the gullible consumer are forbidden and any breach of the Act is punishable by heavy fines.

To let consumers know their rights, we organize frequent information campaigns. A week does not go by without the communications staff of the Office of Consumer Protection being interviewed on radio or television. Every month the office publishes two magazines, one in French and the other in English, full of practical advice for consumers. It also publishes numerous brochures explaining consumer rights. These publications are very popular and reach a large part of the population.

The Act also permits consumers to get access to justice in another way. It allows the Office of Consumer Protection to sign a "voluntary undertaking" with a merchant who has breached the Act. In a voluntary undertaking, the merchant will of course undertake to respect the law, but he or she must also spell out the means to be taken to do so and, if consumers have been harmed, how he or she intends to indemnify them. In short, a voluntary undertaking may allow thousands of consumers to avoid having to go to court to have their rights respected.

In another area, in order to permit Quebecers to receive justice in their dealings with government, Quebec built on the example of the Swedish ombudsman, to create the Protector of the Citizen (Protecteur du citoyen). Today the Protecteur du citoyen deals with thousands of citizen complaints each year. These are generally problems that would be difficult to bring before the courts and which might never find a solution otherwise. Recent Mr. Daniel Jacoby, the present Protecteur du citoyen, stated to the press that seniors, non-francophone Quebecers and people on welfare would be his priority concerns. This tends to pay particular attention to the elderly, who will in the course of years to come make up a larger and larger part of our society, a group often at a loss in dealings with the government. He also reminds us that immigrants and cultural minorities are likely to face many problems with the government, as for example, in cases of services to receive immigrants. To allow them to have better access to justice, the Protecteur du citoyen proposes to hire staff from the cultural communities and establish frequent contacts with authorities in the Ministry of Immigration. As for those on welfare, he has stated that "these people are afraid even though they have rights." They are afraid of reprisals by bureaucrats and as a result often obey an unwritten law of silence.

We have also seen in Quebec over the last few years the establishment of alternatives to the courts, through which

neutral third parties are given the power to make decisions. Among these alternative methods, one might note the approaches chosen by business associations to resolve problems between their members and consumers. Thus the Furniture Dealers' Association and the Jewellers' Association have prepared codes of ethics for their members and established conciliation committees to find a solution to the complaints that they receive. These initiatives show the respect with which these merchants are treating their customers and may serve as examples for others to follow.

Quebec has also recently modernized its rules in the area of arbitration. Arbitration is now becoming one of the preferred methods to resolve a dispute without going to court. To use arbitration, the parties must renounce their right to go to court. They then have the right to choose for themselves the people who will resolve their dispute and the place and time of their arbitration. The decision rendered by the arbitrators is final and binding on the parties.

This type of arbitration is voluntary and cannot be imposed on litigants who have chosen it. It would nevertheless be interesting to study the results obtained in the United States by the programs of compulsory arbitration set up through the courts. In these programs, which exist in several American states, claims for less than a fixed amount that are lodged with civil courts are automatically referred to

arbitrators. The award of such an arbitrator is however not final and either of the parties is free to ask for a trial de novo before a judge. According to some sources, the percentage of such appeals appears to be very small, and the majority of participants seem to be very satisfied with their involvement in this process.

In Quebec we have also seen different types of mediation projects. In family matters, besides a complete revision of the procedure to reduce the adversarial nature of proceedings, a mediation pilot project was started in Montreal in 1981 and was made permanent in 1984. The mediation services available through that program are global, which is to say, the parties have the right to negotiate, at the time of separation, custody of the children, access rights, support payments and the division of property. Naturally the referral of parties to the mediation service is voluntary, the content of discussions during mediation may not be put before a court, and the mediator is not a compellable witness. In addition, during mediation a lawyer working for the Service acts as a consultant on legal questions and may help overcome roadblocks. As for costs, there are none; the mediation services are free. Experience has shown that these services help to reduce conflicts at the time of separation, instead of increasing them as the conventional adversarial system tends to do. After the Montreal experiment, mediation services were set up in Quebec City in 1984 and groups have been formed in other regions to help establish these services regionally.

Mediation programs have also been established in other sectors. For example, a mediation service is available through Small Claims Court and through the Residential Tenancies Board (la Regie du logement). Thus mediation as an alternative dispute resolution technique has a promising future and can be considered an efficient method to permit better access to justice.

CONCLUSION

As you have seen, Quebec has put in place several alternatives to the judicial system. The list that I have given is certainly not complete but it is intended as a fairly accurate description of the efforts that we have been making to dejudicialize the settlement of disputes and to promote access to justice.

We continue to work on the development of these alternatives and I am certain that the work done at this conference will help us make further progress.

for each minute of time spent on every case, forcing staff and mediators to be more limited in their work with clients (see Orenstein and Orenstein, n.d.). As caseloads build up in mandatory mediation programs, volunteer mediators burn out and there is a call for professional mediators. Full-time mediators begin to spend less time on each case and to treat them in more routine ways, the very problems which mediation was designed to overcome.

11. These criticisms are particularly aimed at the "rent-a-judge" system, a variant of the mini-trial in which a judge is privately hired to render a binding decision (Goldberg, Green, and Sander, 1985: 290-293).

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Native American Rights Fund

The Native American Rights Fund is another service established to do educational workshops in the Indian law area; research on critical issues; and to do selected litigation. Once again, it has been a most useful and powerful resource in establishing Indian rights in the United States.

Native Law Centre

The Native Law Centre at Saskatoon maintains an active program of research on a wide variety of aboriginal issues. Major areas of research include aboriginal land rights, the rights of indigenous people in international law, Indians and taxation, water rights, treaty rights and other areas. The Centre publishes a quarterly journal entitled 'The Canadian Native Law Reporter', which provides full text reporting on native law cases. Such activities have made the Centre one of Canada's leading publishers in the Native law area.

There has yet to be established in Canada, the kind of resource centre which will not only do research in the many areas of critical importance, but also initiate test case litigation in areas where the only way to resolve the dispute is through the civil court system. The establishment of such a centre would have many advantages for both aboriginal and non-aboriginal people. First, it would allow aboriginal people to access a court system which would otherwise not be available, because of cost, for the average aboriginal person. Secondly, it would allow for a very cost effective way for determining individual and group rights for aboriginal people. Third, it would remove the conflict of interest problem which is presently

confronting the Federal Government in carrying out their responsibility to "Indians and lands reserved for Indians". Fourth, it would allow for the orderly litigation of important aboriginal rights issues. Funding for the centre should be provided by the Federal and Provincial governments and Aboriginal First Nations.

Aboriginal Courts

It is generally accepted today that aboriginal First Nations prior to European contact, exercised complete sovereignty over their internal and external affairs. We know for example that their traditional laws which in many cases had developed over thousands of years, covered "civil disputes", "criminal disputes" and "family law disputes" in a very comprehensive way. This was initially recognized by the British; gradually this recognition was seriously eroded by the imposition of at first colonial policy and then Canadian law. While there was no explicit agreement on how aboriginal customary laws would apply within the Canadian Confederation, it was assumed by the First Nations that their laws continued. Over a period of time aboriginal First Nations recognized that another law applied to them, but many of those communities continued to use their traditional laws. Today traditional law still survives and is practiced in many aboriginal communities.

To them Provincial and Federal laws are foreign laws which do not reflect their culture. Is it any wonder today that aboriginal people have no real confidence that the present civil court can resolve disputes between aboriginal peoples in a way which means something to them and which respects their traditional laws? Is it any wonder that aboriginal societies want to resolve their disputes according to their own dispute resolution systems and to their traditional laws?

non-Indian sues a non-Indian for a claim within the tribe's territory. Federal jurisdiction in civil disputes is limited to whether it is a "federal question" and whether it is a question of diversity of Citizenship.

Aboriginal courts in Australia

Official responses to law and order in aboriginal communities have generally been limited to the creation of special courts for Aborigines. It covers criminal matters and appears to be premised on establishing a system which makes the Australian legal system more sensitive to the problems created by the existence of aboriginal customary law. The court can take into account the usages and customs of the community. The Yirrkala scheme, in Northern Australia, is worth mentioning. That scheme tries to build on traditional ways of settling disputes and restoring order, while at the same time 'institutionalizing' the procedures so that they fit within the general legal system. The likely composition of a court would be a senior member of the family of the complainant; a senior member of the family of the defendant and a senior person from a family chosen for his/her wisdom in the community. The composition would be different if a non-aboriginal person was involved. In reviewing this scheme the Australian Law Reform Commission referred to 2 issues which would require resolution before the scheme could be implemented --(1) whether individuals should have the right to opt out and seek a trial in the ordinary courts; and (2) whether there should be an appeal to the ordinary courts.

Village courts in Papua, New Guinea

These courts have been established since 1975 on request from the local community and have been described as "perhaps the most important legal institutions in the country". The court's function is 'to ensure peace and harmony in the area for which it was established by mediating in, and endeavouring to obtain a just and amicable settlement to any dispute'. It has jurisdiction over all residents normally resident within its area. Inter-village disputes are dealt with by joint sitting. The courts exercise both civil and criminal jurisdiction although the distinction is somewhat blurred in the day to day work of the court. For the most part compensation in the form of money and community work is used to restore the individuals in the community.

The courts exist largely outside the formal court hierarchy, but there are limited rights of appeal to a local or district court magistrate. A number of local residents are appointed as magistrates and hold office for three years. No specific qualifications are required but short training courses are run by the Village Court Secretariat for new magistrates. The courts apply local custom and are free to determine their own procedure.

In its overall assessment of the Papua, New Guinea system, the Australian Law Reform Commission suggests that the village courts clearly fill a gap in achieving order at the community level and that they are meeting local needs; and that they are reducing the number of cases coming before the higher courts. They have also provided a spur to the sense of community, involvement in the community and a sense of the worth of things run by and for the average villager. This latter benefit is probably one of the more significant benefits of that system and one which aboriginal people feel is very attractive from their standpoint.

Canadian Model - Saddle Lake Tribal Court

An example of the kind of alternative justice system for aboriginal people in Canada is that which is proposed by the Saddle Lake Tribal Council. Their justice system is designed around their traditional concepts of dispute resolution - conciliation, mediation and arbitration. It is a 2-tier concept, which at the initial stage involves a 'peacemaker'. The peacemaker's role is that of trying to resolve the dispute at a level where the parties have not yet become entrenched in their positions. The peacemaker would be a respected person from the aboriginal community -possibly an elder. This is also a step which is performed in the Papua, New Guinea system, by the magistrate.

If the peacemaker is unsuccessful, then the dispute is referred to a tribal court for its resolution. The tribunal itself will sit with three jurors (probably elders) who are nominated by a Tribal Justice Committee. The forum itself is not adversarial in design but rather approaches a round table forum where the function of the three jurors is to listen to all parties and to resolve the dispute based on their customary laws and the traditional dispute resolution philosophy i.e. agreement by both parties that the dispute should be resolved by this forum. A major part of the exercise is to restore balance in the community.

The proposed jurisdiction of this court will include criminal; civil and family law; disputes involving land; agreements among band members; assault; personal property; acts of Chief-in-council; and trespass. Remedies will include fines, restitution, awarding compensation, and banishment.

Methods for Establishing Aboriginal Courts in Canada

There are a number of possibilities which could be utilized to establish aboriginal courts.

Based on Aboriginal Inherent Right to Self-Government

Aboriginal governments could declare that their inherent right to self-government still exists, even though this has been somewhat abrogated by the Indian Act and treaties. They would simply assert that they have an inherent jurisdiction to resolve internal disputes according to their own laws; aboriginal governments would then set up their own systems and either apply customary law or law which they would enact.

In the United States, this residual sovereign jurisdiction has been recognized by the courts and is the jurisdiction which allows tribal courts to operate. In Canada on the other hand, neither the courts nor legislation has recognized this residual sovereign authority. It is true however that the Supreme Court of Canada has never been asked to decide this question. The Gitksan Wet'suwet'en land claim case may decide this in the next few years. It is also true that there has never been in the history of aboriginal rights litigation, a more positive attitude exhibited by the Courts than at the present (Nowegijick, Guerin, Simon) . So while it is entirely possible that this inherent sovereign right might be recognized in the future, an aboriginal government would be taking a bold initiative by establishing a separate court system based solely on its assertion of residual sovereign authority.

Based of Sections 81 and 83 of the Indian Act

A band council could pass a by-law to administer justice and administer a tribal

court system. This could be done by relying on, in particular, section 81(c), (d), (p) (q) and (r) of the Indian Act. Section 83(1)(b) and (c) could also be used to justify the appointment of individuals as judges and for the payment of their salaries. Section 83 however, could only be used if the Governor in Council had already declared that the band had reached an 'advanced stage' of development. The relevant parts of Section 81 of the Act state:

'The council or a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or Minister for any or all of the following purposes, namely:

- (c) observance of law and order;
- (d) the prevention of disorderly conduct and nuisances;
- (p) the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prescribed purposes.
- (q) with respect to any matter arising out of or ancillary to the exercise of powers under this section.
- (r) the imposition on summary conviction of a fine not exceeding one hundred dollars or imprisonment for a term not exceeding thirty days, or both for a violation of a by-law made under this section R.S.C. 149, S.80."

The relevant parts of Section 83 of the Act provides that:

"Without prejudice to the powers conferred by Section 81, where the Governor-in-Council declares that a band has reached an advanced stage of development, the council of the band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes.

Namely;

- (b) the appropriation and expenditure of moneys of the band to defray band expenses;

(c) the appointment of officials to conduct the business of the Council prescribing their duties and providing for the remuneration out of any moneys pursuant to paragraph (a)"

This method cannot be solely implemented by the band council, since by Section 82, by-laws made pursuant to Section 81 come into force forty days after a copy is mailed to the Minister. During this period the Minister can disallow it. Also, by-laws enacted pursuant to Section 83 must first have the approval of the Minister before they are effective. A veto by the Minister in either case would nullify this approach.

One result of this approach is that by virtue of Section 88 of the Act, band by-laws have the effect of preventing provincial law from applying to Indians where there is any conflict between the two. That section renders provincial legislation and regulations subject to the Indian Act, band council by-laws and regulations. The band by-law would therefore take precedence over provincial law on any subject matter in which it had legislative jurisdiction and could direct the proceedings to any court, including an aboriginal court. A major disadvantage of this approach is that it could not be accomplished if the Minister decided to reject the by-law. Also, the present legislative jurisdiction of a band council is relatively limited under S. 81. On the other hand, there is no requirement that Section 81 by-laws cannot be inconsistent with other Acts of Parliament but only that they cannot be inconsistent with the Indian Act. It is possible for a band council pursuant to Section 81(o) to pass by-laws for hunting, fishing and trapping within the reserve that conflicts with existing federal legislation in this field. In this case it would have paramountcy over the federal legislation. The same problem might develop in reference to the Criminal Code or the Juvenile Delinquents Act if bands were to

enact by-laws pursuant to Sections 81(e), (d), (p) and (r) or in the consumer protection area under Section 81(n). Many other important areas, however, do not fall within a bands jurisdiction.

Based on Section 107 of the Indian Act:

Another option of establishing the tribal court would be to utilize Section 107 of the Act. That Section says:

"The Governor-in-Council may appoint persons to be, for the purposes of this Act, Justices of the Peace and those persons have and may exercise the powers and authority of two Justices of the Peace with regard to:

(a) offences under this Act, and

(b) any offence against the provisions of the Criminal Code relating to cruelty to animals, common assault, breaking and entering and vagrancy, where the offence is committed by an Indian or related to the person or property of an Indian."

Band council by a band council resolution would name an individual to be a Justice of the Peace. The Justice of the Peace would have to be appointed to that position by Governor-in-Council. This individual would then have jurisdiction to hear offences under the Indian Act, those Criminal Code offences indicated in Section 107 and any breaches of band by-laws. One other possibility under this section is to include a cross appointment by the province as a Justice of the Peace under provincial legislation. One of the major problems with this approach, is that the Justice of the Peace must be appointed by the Governor-in-Council and therefore the establishment of a tribal court would be at the pleasure of the Governor-in-

Council. Both the S. 107 approach and the S. 81 approach would at best, be a temporary solution to the establishment of a justice system on the reserve.

Based on Parliament Amending the Indian Act

An aboriginal court system could be established by Parliament amending the present Indian Act or creating a completely separate Act to provide for this. The authority to do this is found in Section 91(24) of the Constitution Act (1867). That Section reads as follows:

"It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,-"

"S. 91(24) - Indians, and the Lands reserved for the Indians."

Based on Parliament's Authority to Establish Courts under S.101 of the Constitution Act (1867).

An aboriginal Court system could be established by Parliament using Section 101 of the Constitution Act (1867). Section 101 states:

"The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada. (emphasis added)"

The last two approaches would offer the greatest security. It would also allow expansion of the jurisdiction of the court into enlarged criminal jurisdiction, family law and civil law jurisdiction.

Some Jurisdictional Issues

There are a number of jurisdictional issues which will concern both aboriginal governments and federal and provincial governments. The question of what kind of jurisdiction the Tribal Court will exercise will for the most part, be determined by the way that this Court is established.

There is the question of what kind of matter the Court could deal with. For example under Section 107 of the Indian Act the jurisdiction of the court would be limited to minor criminal offences but if a Court were established pursuant to S.101 -there could be unlimited jurisdiction over criminal and civil matters.

Generally speaking, aboriginal governments want to take over jurisdiction in some criminal offences; some civil matters; family law matters; and band government matters. Secondly, in respect to territorial jurisdiction, the Court would have jurisdiction within its reserve boundary. There is still a question of where the reserve boundary is if the reserve is adjacent to a lake or a river. Also there is the issue of whether the Court will have jurisdiction over 'surrendered land'. The aboriginal position is that the territorial boundary applies to the middle of the body of water and that it has jurisdiction over surrendered land.

The next jurisdictional issue is what person will the Court have authority over. Should it be all people within the boundaries of the reserve, only aboriginal people within the reserve boundary or over all persons, but it must be in respect to a suit or offence which happened within the reserve boundary. It would seem that the Court should have jurisdiction over all persons so long as it concerns something which happened within the reserve boundaries.

Other Issues

There is a real question as to whether some bands would have the resources and expertise to implement a distinct Court system of their own. This is a normal concern but one which may be overcome by small bands co-operating with neighbouring bands to pool their resources. Such a larger unit would then co-ordinate the Administration of Justice by ensuring that there was adequately trained personnel, facilities, financing, fulfilling an advisory function etc.

Another issue which concerns governments is whether the established Court

system will exercise an appellate function. The presence of an appeal court would help to allay any fears of inexperience or the possible unfairness or absence of rules of natural justice. More than likely the Canadian Courts would exercise this appellate function unless there was an agreement to the contrary. Finally there is the question of how the Canadian Courts and the aboriginal courts will inter-relate. Will each enforce the decisions of the other court? Will each court respect the exclusive jurisdiction over certain cases or will the person have a right to be heard by an established court? These are questions which must be answered prior to these Courts being established.

Reason For Establishing Aboriginal Courts

1. The establishment of these Courts would contribute toward the recognition of the right of aboriginal peoples to retain their identity and traditional values and customs.
2. In many communities, as a result of geographical inaccessibility to the Court system, aboriginal courts would assist in resolving disputes in an efficient and relevant way. It would silence the criticism by aboriginal communities that they are tired of fly-in and fly-out justice which allows them little input or control of what happens to their people.
3. It would provide a way to compensate aboriginal peoples for past wrongs, including the initial injustice of non-recognition of traditional laws and dispute resolution systems.
4. It would promote the community working together rather than pulling it apart.
5. Parties to disputes would appear before community peers rather than strangers.

6. The resolution of disputes would be quick and efficient - something which our present court system cannot hope to achieve.

Reasons For Not Establishing Aboriginal Courts

1. There should be one law for all and one court system for all. To establish an aboriginal court system would violate this principle and would be divisive in respect to aboriginal peoples and the rest of the Canadian public (but Quebec has its own system of laws recognized by its own court system). Aboriginal people were here long before the French arrived and if anything should have the same opportunity.

2. The difficulties of defining and formulating how these courts would operate might preclude their establishment; i.e jurisdiction problems, what is customary law etc.

3. If traditional laws were to be recognized, there would have to be some way of giving non-aboriginal people notice of those laws, so that non-aboriginal people would know when they were not conforming to traditional law. Codification might mean that traditional law would lose its flexibility to change as the circumstances dictated.

4. It is now too late to recognize traditional laws through aboriginal courts because these laws have ceased to exist in any meaningful way.

5. The establishment of these courts should be restricted to geographically remote communities and should not extend to aboriginal peoples living in an urban setting.

material and spiritual resources that it becomes very difficult to win the action on the merits by the time the case is decided. Also, witnesses have often died, moved away, or forgotten the facts. And it is always more difficult to excite judges about stale injustices.

The irony in all of these standing actions is that the purpose of the standing law - to avoid wasting the time and money of the courts and litigants - is not achieved. In virtually all of the reported standing cases, the issue has been a simple question of law. [For example, in Thorson, whether the Official Languages Act was ultra vires Parliament; in McNeil, the constitutionality of the provincial theatre censorship scheme; in Borowski, the constitutionality of the abortion sections of the Criminal Code, and in Finlay, whether the Minister of Finance was obligated by law to make payments to the Province of Manitoba when the province was allegedly in breach of federal/provincial cost sharing agreements under the Canada Assistance Plan.] All of these cases could have been argued in a day and, would, therefore, have consumed only one judge day. But, when we add the time consumed by leave to appeal applications to the Court of Appeal and the Supreme Court of Canada, as well as the appeals themselves, the standing question alone can consume 25-30 judge days, depending on the number of

judges on the panel which hears the case in the Court of Appeal and the Supreme Court of Canada. As a pure matter of efficiency, therefore, it would usually be far more productive to hear the case than to decide whether or not it should be heard.

The abuse of the law of standing by government lawyers has been a barrier to access for many years. The law's currently restrictive state cannot withstand serious scrutiny on policy grounds. Nevertheless, the Law Reform Commission of Ontario has been studying the issue at a snail's pace for years; it has yet to publish its report. To the best of my knowledge, the problem isn't even being studied elsewhere in Canada. That much maligned, supposedly arch-conservative group, the appellate judges, have been far ahead of law reformers, attorneys-general and legislatures, and have brought us what standing reform we have seen over the last fifteen years. But the courts have taken it about as far as they can be expected to go. The rest is up to the legislature.

Bureaucratic Defiance of the Law

There is another area where access alone does not help. It too has been very poorly described and is virtually undocumented in the academic literature.

Perhaps the best way I can describe it is as 'bureaucratic defiance of the law'. My friend Dick Gathercole of the B.C. PIAC has noted, in the context of test case litigation, that winning a test case often doesn't help. The rich get richer and the poor get lawyers. [Cite] But, until the results of a successful test case can be integrated into the overall REFORM strategy of the community or the group putting forward the case, its impact on law of behaviour may be minimal.

An excellent illustration of this is found in the notorious 'man in the house' rule. Social assistance is sometimes terminated if there is evidence that a female recipient has had a male visitor. The rather sexist and unfair assumption is made that if he is visiting her, especially if it is overnight, he must be supporting her. Since she has not reported this support, she is assumed to be defrauding the welfare authorities and her assistance payments are stopped. There have been, to my knowledge, at least three cases brought by women in this situation and they won all three. [Cite] The conclusion of the judges has been that the agency placed undue emphasis on the sexual aspect of the relationship with insufficient emphasis on the economic. What is interesting and revealing is that the same case has had to be re-litigated because welfare bureaucracies

have failed to respect legal precedents. Although it is now contrary to government policy in Ontario to employ the "man in the house rule", like George Bernard Shaw's premature obituary, the rumours of its death are greatly exaggerated.

In these situations, access to justice does not produce justice because of the sheer number of decisions that must be made, and the insulation of the wrong-doer from any practical consequences. Field staff may not be aware that regular departmental practice has been declared illegal or, if they are aware they may not have any reason to care. For example, federal immigration officials have been told by the Federal Court of Appeal, clearly and unequivocally, that if a couple are legally married, immigration officers are not to look behind that marriage to decide which are marriages of love and which are marriages of convenience. Nevertheless, in the recent Bhatnager case, in which two cabinet ministers were required to appear before the Federal Court on citations for contempt, the departmental documents still referred to the matter as "MOC", departmental shorthand for marriage of convenience. These officials dragged out the immigration for several years, refusing to comply with one court directive or another, making it as difficult and costly as possible for the immigrant.

This was their way of enforcing an illegal internal rule against so-called marriages of convenience.

The man in the house rule in social assistance, the marriage of convenience rule in immigration and other such unofficial, unauthorized attempts of the bureaucracy to impose illegally their private morality on public laws are extremely difficult to fight. The most serious difficulty arises from the fact that bureaucrats are insulated from the consequences of their conduct. Typically, if someone wrongfully applies the marriage of convenience exclusion, by the time the matter is resolved by litigation, the bureaucrat may well have been promoted into another job, transferred to another department or forgotten all about it. The costs of the action will never be paid by the official personally but will come from the departmental budget or, perhaps, from the Attorney General's budget. The official is unlikely to be demoted or dismissed, and can very easily make excuses: "I am not a lawyer and simply didn't know", or "This seemed to be a more extreme case" or "It seemed different from what may have been mentioned in the departmental bulletin circulated a few years ago".

Social assistance bureaucracies are always under pressure to keep costs down. Hence there may be

tacit approval from senior officials on the understanding that "I don't care how you do it, just do it". The odds of being caught are very slim, since many of the victims will be reluctant to complain for fear of reprisals. That is the reality when one is totally dependent for one's livelihood on the goodwill of others. Where so much power must inevitably be given to people at the bottom of the bureaucratic ladder, mere access to law, where it exists, may be ineffective in providing access to justice.

The only solution may be to make individual civil servants responsible for the consequences of their actions when they behave in a manner that they know or ought to know is contrary to law. Although it is the function of the government to protect its employees when they are acting in the course of their employment, it is not in the course of their employment to behave illegally. Accordingly, when they know or ought to know that what they are doing is illegal, the government should not cover their legal defence costs and should also make such conduct cause for demotion or dismissal. Perhaps to assist the government along this path, one of these days an alert and aggressive poverty lawyer will successfully bring an action against an individual public servant who has willfully defied that law in this way and, thereby,

introduce into the bureaucracy the accountability faced by most adults in our society: responsibility for one's actions.

The Bottomless Pocket of the Crown Law Office

One of the major arguments of government lawyers, regardless of how trivial an issue may appear to others, is that "a dangerous precedent may be created". Whether this is a genuine fear or a bogeyman designed to enhance empire-building within Crown law offices is difficult to say. However, it seems all too easy to insist that virtually anything done for the first time will create a precedent which may have costly consequences and, therefore, to fight tooth and nail against it. This is deeply imbedded in the 'corporate culture' of the Crown law office.

Consider, for example, the strong resistance to paying the legal fees and costs of the nurse Susan Nelles, who was wrongfully accused of murdering babies at Toronto's Sick Kids' hospital. That prosecutors will occasionally make a careless mistake is inevitable; no one is perfect. However, after the criminal charges against Nelles were thrown out at the preliminary inquiry, the Crown refused for a long time to acknowledge any responsibility for her legal costs for fear that this

would create a dangerous precedent. Even now, although a financial contribution towards her costs has been made, there has still been no acknowledgement of error, nor acceptance of her right to sue.

Unquestionably, because compensation has not been paid before in such cases, this case does set a precedent. In future it could be difficult in certain borderline cases to determine whether or not the individual who is wrongfully accused escaped on a mere technicality or was the victim of an essentially negligent prosecution. However, where as in this case the error in judgment was blatant, the precedent is obviously a good one. Rather than being fearful of creating a precedent, our governments should be content to do the honourable thing, even if it does cost money. Perhaps because it does, prosecutors will be more careful in future cases.

This is but one of numerous examples of defendants' lawyers, usually representing some agency of government, resisting at enormous public and private expense what should be conceded. Lawyers acting for private litigants usually settle cases if it is in their economic interest to do so. They behave with economic rationality. Government lawyers are not bound by the

same economic constraints and are much more reluctant to settle or concede anything. This is especially so at the federal level, where the deep pockets of the Crown squeeze out anyone but the largest corporation or most fanatical individual. With anyone for whom time and money are no object such legal games can be played, but to everyone else, having access to a lawyer will do little to provide access to justice.

A final example of a situation in which access to a lawyer may not help is found in the process before many administrative tribunals. Public utilities boards in most provinces (or the Ontario Energy Board and the Telephone Services Commission in Ontario) set the rates for a number of essential services. For each individual, the amount of money involved in a particular rate case may be only a dollar or two a month. In total, however, tens, if not hundreds of millions of dollars could be transferred from small consumers to large industrial users or to a utility itself as a result of a relatively minor and subtle change in accounting techniques.

To participate effectively in these cases requires more than a lawyer. It takes the work of a small team of expert witnesses with experience in regulatory economics. For example, our office recently

spent in excess of \$200,000 fighting the Bell Canada Revenue Requirement and Rate Rebalancing hearings before the CRTC. Intervention in a typical Consumers Gas case before the Ontario Energy Board can easily run to \$50-100,000. A lawyer working alone in such a case, without access to expert witnesses, is like a car without gasoline. Yet there is still no scheme in Ontario (or indeed in most provinces) for funding consumer intervention on an on-going basis.

Legal aid plans usually do not even recognize regulatory tribunal work as eligible for legal aid (with the exception of Manitoba and, to a limited extent, Quebec). A proposal for intervenor funding was put before the Ontario Cabinet last year but, apparently, has gone nowhere, despite the fact that such funding would not come out of government coffers but would be paid by the applicants for rate increases. As well, although some tribunals can award costs, they are confined to doing so at the conclusion of the case, which makes it very difficult for many to participate on an extensive scale because of the need to provide interim financing for the case while waiting for the decision. Nor can intervenors borrow the funds and speculate that their full costs will be awarded. Virtually any intervenor group would immediately be bankrupted by the cost of such

a case if costs were not awarded. That is why I'm convinced, on the basis of over fifteen years' personal experience in these cases, that all across Canada ordinary residential consumers of telephone service, electricity, natural gas and cable t.v. may be paying hundreds of millions of dollars more each year than they should be, to the benefit of large users and shareholders of the utility.

Thus far we have been discussing situations in which one might have access to lawyers yet not have access to justice. Let us turn now to situations in which access to lawyers may itself be limited.

ACCESS TO LAWYERS

Almost exactly sixteen years ago, I attended the National Conference on Law and Poverty organized by Professor Irwin Cotler of McGill University who was, at that time, an assistant to John Turner, then Minister of Justice. Many of the people who were at that conference have gone on to careers in politics. For example, Mike Harcourt and Ian Waddell of Vancouver, or Herbert Marx in Quebec. The big debate at that time was whether legal aid should be delivered by means of store-front clinics or certificates to lawyers in general practice. As usual, the good grey Canadian compromise prevailed and we

do both. Most of us at that conference were like legal missionaries. We believed that the poor were entitled to the same legal services as those who were more well-to-do, although perhaps on a more modest scale. We thought that what the poor really needed was an opportunity to "sue the bastards", just like the more affluent could do.

Of course, like everyone else, the poor have disputes with their spouses, their landlords, or with each other. They need lawyers for these disputes just as they need dentists to fix their teeth. But none of these will necessarily improve anything for them as poor people.

The goal of the public interest lawyer is - or at least should be - to change the system which excludes his or her clients, so as to get them their rightful place in the sun. Unfortunately, all too often, the service delivery system is organized so that the lawyers' principal function becomes to keep clients' terminal depression and helplessness at bay. Clinics struggle to keep hope alive while the crushing caseload of collateral skirmishes precludes creating any real social change. George Bernard Shaw once said "the purpose of the physician is to amuse the patient while nature cures his disease". Unfortunately for the legal aid lawyer, this

does not work in law. Lawyers may amuse - or cause despair - but this 'disease' can't be cured by nature because nature didn't cause it - laws did.

Can law be used to create social change? Not all by itself, but law can function as a catalyst. For example, a case like Murdoch in the family law area so shocked and outraged Canadians as to stimulate a prompt change in the law. Who can doubt that the Morgentaler case has irreversibly altered our abortion law? The Singh case has profoundly influenced immigration law by guaranteeing immigrants at least one hearing in person: As a result the new Immigration and Refugee Board will have 120 members, in contrast with approximately 50 on the current Immigration Appeal Board. Other examples can be found in the doctrine of fairness in administrative law or equality rights under the Charter. But as yet there has been no precedent setting case in environmental law, despite the great need. Nor has there been any success in class actions and very few in social assistance.

Public interest law is broader than poverty law. Generically, it covers the full range of unrepresented or under-represented interests - the environment, handicapped, minorities, the elderly, native

people, the poor. Some of these are not excluded or denied access in the narrow sense, but, practically, are under-represented in test cases with a law reform focus.

Yet we have made considerable progress since that conference sixteen years ago. In Ontario, we have ARCH, a strong clinic representing the interests of the handicapped; LEAF is very visibly and aggressive working on issues of gender equality; we have specialized clinics assisting injured workers and also the Canadian Environmental Law Association. But all of this meets only a small fraction of the total demand, and there is no feedback loop to law reform. Thus, the emphasis has had to be on band-aid work which tends to alleviate short-term pain without making major systemic changes.

The argument that the poor are now well represented by legal aid and that only the middle class are excluded is untenable. The poor receive little legal aid of a nature that can change the system. Very little legal aid money goes to test case litigation and, even when it does, there are few resources with which community organizations can follow up with appropriate pressure for legislative and bureaucratic reforms.

For its part, the several law reform commissions in Canada have various priorities but access to justice is not high on the list. Nor is there any institutional vexus between them and legal aid.

If the Wisconsin study [cite] is applicable to the Canadian context, as I think it is, then we, too, erroneously believe that our courts are clogged with the kind of major high-profile litigation which newspapers and law reports cover. However, the more typical case, probably an action for damages of the order of \$10,000, is most unlikely to go to trial or to involve a lot of pretrial motions. It will probably be settled for an expenditure of legal fees of \$1-2,000. This sounds very much like litigation that is affordable to the middle class. Thus, while we may be horrified at the size of the legal bill facing a Susan Nelles or Henry Morgentaler or even the federal government for Sinclair Stevens at the conclusion of the Parker Inquiry, such cases are so atypical as to provide no basis for discussion of the affordability of legal fees.

WHY THE EXCLUDED ARE EXCLUDED

The unrepresented are so for one simple reason: lack of the political will to change. They are unrepresented because our politicians think that's what

our society really wants. There is the political fear that the electorate won't give as high priority to improving the law, and access to lawyers, as it will to a new bridge, highway, neo-natal care unit or grant to keep a factory open in a depressed area. But politicians underestimate and are behind the public. The public has a keen concern about legal issues, for example environmental law - to the point that our Prime Minister recently felt impelled to raise the acid rain issue with Ronald Reagan again. If that is so, why don't we have five Canadian Environmental Law Association offices across Ontario, each with a million dollar budget? Not because it is too expensive financially; in Ontario we probably spend many times that on tariffs that are hidden subsidies to the wine and beer industry. Rather, the fear is that it would be too costly politically: what would the logging industry or the paper industry or the mining industry say if we had a really powerful and effective environmental movement which could give the Ministry of the Environment a bit of healthy competition? But the general public is not so fearful.

A recent study by Environics Research Group Limited [Survey of Public Attitudes Toward Justice Issues in Canada, June 1987] showed that 96% of Canadians believe it is important to maintain a good justice

system, regardless of the cost. While eighty percent agree that the justice system is a relatively good use of tax-payers money almost 9 Canadians in 10 feel insecure about their knowledge of the Canadian system of justice. Nevertheless, community legal education is still vastly underfunded.

When it comes to familiarity with legal aid, only 5% of Canadians believe they are familiar with the legal aid plan in their province. A further 28% were "somewhat familiar" while the remaining 67% were either not very familiar, not at all familiar or did not know. Interestingly, those with higher incomes and higher education seemed to be more familiar with the legal aid plan than those with lower income and lower education. When it comes to agreement or disagreement with the statement "everyone is equal before the law", 66% agreed, either strongly or somewhat. However, agreement with this statement declines with rising levels of income and education. Some 76% of Canadians agree that many of Canada's laws have not kept up with changing standards of today's society, and this agreement was fairly uniform across household income and education levels.

In the absence of comparisons with alternatives for spending of public resources, such as on health care,

highways or defence, it is difficult to say precisely what such figures mean. Yet the Canadian public seems to have a fairly realistic view of the impact of the legal system. It recognizes that many of our laws no longer reflect contemporary values, and would not begrudge spending more to improve the legal system. Other questions in the survey also showed a reasonably generous attitude towards legal aid. It is to be hoped that in the not-too-distant future, our lawmakers will catch up to their constituents.

INCLUDING THE EXCLUDED

Prior to preparing this paper our office attempted to obtain funding with which to undertake a statistical analysis of the various outputs of the Ontario legal system. We had planned to look at trends in the complement of judges, in cases decided in relation to certain benchmarks, e.g., per capita, vs. changes in gross domestic product, etc. However, as no funds were available, we were unable to develop any quantitative critique of the Ontario civil justice system.

Such statistics as are available from the Ministry of the Attorney General cover the courts only, and are in such aggregate form that they cannot really tell us much about what is really happening. Although

they show how many actions were filed, how many cases decided, how many abandoned, etc., number of cases does not tell us anything about judicial workload. A federal study showed [Department of Justice, Canada, Bureau of Programme Evaluation and Internal Audit, "Evaluation of the Divorce Act, 1985," June 1987] that 39% of divorce cases required less than 15 minutes of court time, and a further 18% one hour or less. In only about 8% of divorce cases was the hearing a full day or longer. Twenty-five percent were done entirely by affidavit. Thus, although divorce cases represent a sizeable percent of the total litigation, they consume a much smaller percent of judicial time. Perhaps the day is not too far off when we will follow the example of other jurisdictions which permit divorce by mail on the consent of both parties. As Mr. Justice Estey has observed:

Probably, were it not for the ecclesiastical courts, family dissolution would have been determined administratively centuries ago." [The Honourable Mr. Justice Willard Estey, "Who Needs Courts?" (1981) 1 Windsor Yearbook of Access to Justice 263 at 275]

If we could lower the cost of divorce, we could lower the percentage of legal aid budgets spent on obtaining divorces for poor people. This would leave

more of the budget to be spent on other legal aid activities.

Divorce is a relatively small part of the problem. More serious is the tendency for the court system and its rules to be geared toward handling the most pathological rather than the average case. This creates enormous cost and delay, yet lawyers and judges have become accustomed to operating this way. The more informal (and more efficient) systems used by most administrative tribunals are often regarded with some disdain by denizens of the formal court system. That is why reform of the courts is far too important to be left to lawyers and judges alone. It must be undertaken with substantial input from persons with expertise in a variety of disciplines, including time and motion studies, systems analysis and economics. Lawyers are not noted for possessing these skills.

But modest tinkering with the courts will not suffice. The entire system - tribunals and courts - needs major overhaul, along with much of the substantive law and procedure. A short, eclectic list of important reforms follows.

1) Costs Awards in Board and Tribunals

All boards, commissions and tribunals should be authorized by their enabling legislation to award intervenor costs; in Ontario, especially the Ontario Energy Board, the Environmental Assessment Board and the Ontario Municipal Board. Costs should be able to be awarded both at the end of the case and on an interim basis throughout. Tribunals should be expected to exercise this power consistently and in a way that will encourage access to their hearing processes.

2) Funding for Advocacy in Rate and Other Tribunals

There should be more funding available for advocacy before boards. These boards affect thousands or even millions of persons of all income classes throughout Ontario. For every dollar spent in this way before rate-setting tribunals, the return for ordinary consumers is likely to be many times that amount. Yet legal aid discriminates against rate regulation advocacy in most provinces on the basis that it appears to help the middle class. Of course, if it keeps telephone or gas rates down for the poor, it will also do so for the middle class. But so what? If it helps the poor and is cost effective, such help as it provides the middle class is an added bonus. After all, the middle class pay for legal aid too and get nothing visible in return for it.

Similar reasoning applies to other tribunals such as the Environmental Assessment Board.

3) Greater Emphasis in Legal Aid on Cases That Change Things

There must be greater recognition in legal aid of the need to advance societal or group interests and less reliance on the narrow A versus B model of litigation. This can be furthered by greater emphasis on test cases with appropriate community follow-up, and progression from the outdated view of a clinic as a revolving door admitting an endless parade of similar cases. Legal aid should provide specialists in class and group actions, appellate litigation and community organization.

Stephen Wexler in his still relevant article "Practicing Law for Poor People" [(1970) 79 Yale Law Journal 1049] observed that:

"Poor people are not just like rich people without money. Poor people do not have legal problems like those of the private plaintiffs and defendants in law school case books. People who are not poor are like case book people...Poor people do not lead settled lives into which the law seldom intrudes; they are constantly involved with the law in its most intrusive forms. For instance, poor people must go to government officials for many of the things which not-poor people get privately. Life would be very difficult for the not-poor person if he had to fill out

an income tax return once or twice a week. Poverty creates an abrasive interface with society; poor people are always bumping into sharp legal things....Poor people will still be bumped and chafed and jostled by the law after the lawyers have completed their last appeal, shaken hands with those who opposed their clients and snapped their briefcases closed."

Wexler suggests that even if all the lawyers in the U.S. worked full-time, they could not deal with even the articulated legal problems of the poor. And if somehow they could, they would not bring much change to the tangle of unarticulated legal troubles in which the poor live. Accordingly, he felt that a proper job for a poverty lawyer is to help clients to organize themselves to change things. This can comprise four different steps:

- i) informing individuals and groups of their rights
- ii) writing manuals and other accessible materials
- iii) training lay-advocates
- iv) educating groups for confrontation

Although his emphasis on confrontation seems a bit dated (what are the Chicago Seven doing today?), most of his article is as relevant today as it was then.

4.) Reforming Substantive Law

All the changes in lawyering aren't going to make much difference until we have changes in substantive law to reduce the need for access to lawyers. Just as we can simplify divorce law to get rid of the judicial presence, we should tie case load to law reform. New, specialized law reform groups should be created within legal aid, and given the job of developing laws to solve problems revealed by legal aid workload statistics. They should report not to the Attorney General directly but, rather, through the legal aid plan. Their analysis of legal aid statistics and discussions with clinic lawyers and their clients should enable them to pinpoint the laws which cause the most harm. They can then propose reforms to correct these injustices.

As well, they should examine areas of law where no cases are being brought, either because causes of action that should exist do not or because rules of practice and the procedure of courts or tribunals make it uneconomic or too complex to seek redress. Unless and until we have a feedback loop between law reform and legal aid, our present law reform commissioners will all too easily spend years on the rule against perpetuities, while legal aid continues to apply band-aids to millions of little cuts.

5.) Reforming Procedure

We should change the rules of procedure of many boards and tribunals to enhance access. In courts we should liberalize standing, class actions, and rules of procedure for key remedies. For example, the Federal Court rules still require that declarations against the Federal government be by way of lawsuits, a very slow and costly procedure.

6.) Role of Crown Counsel

The Attorneys General should instruct crown lawyers to change the attitude towards civil cases. Historically, prosecutors are told that their objective is not to try to convict for the sake of victory but to see that justice is done. However cynical one may be about the effectiveness of those instructions, that is the policy. On the civil side the official word doesn't seem to be even that progressive. As Wexler has noted, lawyers for the poor lose too often because the rules are against them and because the most unflinching fighters are the lawyers for the other side. In Canada, these are most often government lawyers. I agree with Wexler that in many cases where there is no reason why both sides should not agree to take a certain action, there will be opposition from government lawyers because the rules of

the game permit opposition. Suits will be delayed because it is possible to delay them. Petty rules will be relied on because they are there to be relied on. Discovery will be opposed not because there is anything to hide but because the rules permit the opposition. [Wexler, above, at p. 1060]

The record in non-criminal Charter cases is particularly revealing; the government has lost most of them. Yet at no point along the way is there ever the admission that the government was wrong - not until the Supreme Court of Canada has finally said so. .

I recently had the experience of negotiating a case with a senior government lawyer in Ottawa. There was a single, critical issue of law which would decide the case one way or the other, and no serious dispute about the facts. I proposed that we present this issue to the court in a joint stated case. His response was that if he agreed to such a course of action his Deputy Minister would send him out immediately for a psychiatric examination. I knew exactly what he meant.

If he resolved the case promptly, not only would it potentially embarrass his client department but his boss would only give him another case. There is no

reward for being cooperative. However, if he built it up into a really big thing, he would be given another assistant. To paraphrase Murphy's law, if an issue can be litigated it will be, and this is because the iron law of bureaucracy is growth.

Thus, the more battle prone the crown lawyer becomes, the faster he or she can move from private to sergeant to general. Until these incentives are somehow reversed, such legal progress as may be made by the poor will often be offset by an expansion in litigation efforts on the part of the bureaucracy. Very often, as in academic politics, the degree of resistance will be inversely proportional to the importance of the issues at stake.

7.) Private Dispute Resolution

It may be possible to reduce the cost of justice by allowing for more private dispute resolution. Many commercial cases would be better decided privately than by the regular court system and would probably go that route provided that a for-hire dispute-resolution system were possible. If entrepreneurs want to rent some rooms and hire some lawyers or retired judges to resolve commercial disputes why not encourage it? One

Toronto group, Private Court, has already started doing this [Globe & Mail, May 19, 1988].

From a marketing standpoint, it is remarkable that we have allowed the state to have a virtual monopoly on conflict resolution for centuries, without any requirement that output be increased to meet demand. Although a whole book could be written on this topic, all that can be said within the constraints of the available space is that if even 20 or 30% of the existing litigation were "privatised" in this way, it would do a lot to ease the pressure on the courts.

Moreover, in addition to displacing existing litigation, entirely new kinds of issues could be resolved privately by bringing the unit cost of dispute resolution down to more affordable levels. Important strides have already been made in this area in matrimonial law through voluntary mediation and also in arbitration of some commercial complaints. So long as both parties have access to all of the relevant information and rough equality of bargaining power, such alternative mechanisms can work, both effectively and fairly.

It can always be argued that building more court houses and hiring more judges is just like building

expressways - demand expands to occupy the available supply. That is true, but then the saturation point is reached. While we cannot afford the saturation point with expressways because they are built entirely on public land at public cost, greater private initiative in conflict resolution would meet rising demand from private funds.

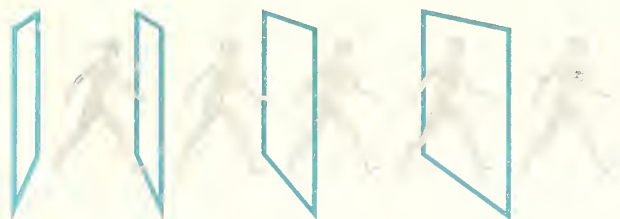
Bringing down the unit cost of dispute processing and giving the courts a bit of healthy competition from private sources is one way we can avoid pushing the poor into second class justice.

Private sector courts could sit in 8-hour shifts around the clock, including on weekends, to make it possible for those who work in shifts or who cannot afford to take time off during the day to do so at times convenient to them. Such private courts could draw lawyers or judges from a variety of multi-cultural backgrounds to resolve disputes for those for whom English or French is not their first language. They could easily obtain adjudicators with specialized backgrounds in, for example, social assistance (eg. ex-clinic lawyers) or whatever background would be useful for the particular task at hand.

8.) Make It Someone's Job

Finally, none of this will happen unless we make it someone's job to see that it gets done. Don't just have a conference on poverty every sixteen years; appoint someone whose job it is to introduce change. We need to create a new position Federally and in each province - Deputy Attorney General - with responsibility exclusively for access to justice. This person's function would be to coordinate and oversee access enhancement programmes within governments including law reform, legal aid, tribunals and courts. With a job such as this as a catalyst, and with the political will to make it happen, access to real justice will come a lot closer to realization.

True justice, like perfection, is an ideal we can never attain. But unless we strive mightily and tirelessly to achieve it, the gap between the ideal and the reality will continue to grow. We can, and we must narrow that gap. All it takes is political will, Messrs. Attorneys General. Have your governments got it?



Conference
on Access to
Civil Justice

Congrès sur
l'accès à la
justice civile

ACCESS TO CIVIL JUSTICE FOR ABORIGINAL PEOPLES

Conference on Access to Civil Justice

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Access to Civil Justice For Aboriginal People

Executive Summary

For aboriginal people the present civil justice system represents a foreign system, and one which enforces different values, and laws. This has developed as a result of the relationship which has developed between aboriginal peoples and the rest of the Canadian society. This poses particular access problems for aboriginal people that non-aboriginal people do not have. Additionally, aboriginal people find the civil justice system inaccessible because of their socio-demographic problems. The main problems why aboriginal people cannot or feel they cannot access the civil justice system are summarized as follows:

- (1) Aboriginal People have been conditioned to mistrust the Canadian Judicial System, part of which includes the civil court process, i.e. a perceived bias against aboriginal people:
- (2) The Canadian justice system has not recognized aboriginal customary laws; laws which have been used, in some cases, for thousands of years and therefore denies aboriginal people their right, in international and Canadian law to self-determination;
- (3) The adversarial system, used by the Canadian judicial system, is antithetical to the traditional aboriginal dispute resolution system;
- (4) The aboriginal people in Canada are unfamiliar with the courts and their rights as Canadians, in the context of Federal and Provincial law;
- (5) Until recently, there has been an obvious lack of representation for aboriginal people in the Canadian judicial system by aboriginal lawyers and judges;
- (6) A majority of aboriginal people have incomes substantially less than the average Canadian, and as a result, many of the problems which aboriginal people experience are "poor people problems". Lawyers generally do not

want to deal with "poor people problems".

- (7) The time it takes to solve their legal problem is something which aboriginal people cannot accept.
- (8) The cost of having a civil suit adjudicated by the court, is prohibitive;
- (9) The socio-economic position of aboriginal peoples make the courts inaccessible.
- (10) The civil court system is an inappropriate forum to resolve issues dealing with claims and aboriginal rights.

There are a number of ways that these access problems can be solved. First it is apparent that aboriginal people do not understand the law as it affects them and that they have limited knowledge of how the civil justice system works. One of the most crucial steps in solving this problem is to provide aboriginal people with information which will allow them to assess what, if anything they can do about accessing their rights. There are a number of ways of doing this but at the least it should be something which is undertaken in co-operation with aboriginal people. The workshop method of providing information to a resource person at the aboriginal community level is very effective.

Secondly, aboriginal communities want and need more aboriginal lawyers to work at the community level. Law schools should be encouraged to continue to make special efforts to accept and graduate more aboriginal applicants. The legal profession and the Judiciary should be encouraged to become knowledgeable in native law.

Finally, a native law centre should be established to do critical research on aboriginal issues and to litigate specific aboriginal issues which will help to clarify the law between aboriginal people and non-aboriginal peoples.

A very important change which should be made is to establish aboriginal courts.

This would have many advantages both for the aboriginal communities and for the rest of the Canadian society. Primarily it would allow aboriginal people to be better accommodated in the civil justice system by, allowing them to determine disputes within their jurisdiction.

There are a number of ways that this could be accomplished:

- (1) Aboriginal people might assert that they have a sovereign authority based on their traditional societies to establish a court. Current case law does not support this approach but it nevertheless is still a possibility;
- (2) Bands could enact by-laws pursuant to Sections 81 and 83 of the Indian Act to establish a court. These by-laws would be subject to approval by the minister. The court would also have limited jurisdiction;
- (3) The bands could establish a court pursuant to Section 107 of the Indian Act. That Section allows for the appointment of Justices of the Peace who would have jurisdiction over offences under the Indian Act, minor Criminal Code offences and jurisdiction to enforce band by-laws;
- (4) The Federal Government could use its power under Section 91 (24) to establish an aboriginal court. The court could be established under a separate 'act', i.e. "Aboriginal Court Act of Canada" or by amending the present Indian Act. The court would have as much jurisdiction as the 'act' provided for.
- (5) The Federal Government pursuant to Section 101 of the Constitution Act (1867) could establish a separate court system to administer matters dealing with aboriginal people and matters. Once again the jurisdiction of the court would be as much as the Federal Government granted.

A special tribunal should be established to resolve the ever increasing specific and general claims. Courts are being asked more and more to handle these very difficult issues which they are ill-equipped to deal with.

Other jurisdictions have realized this problem and have created various forums to handle the problem. The Waitangi tribunal in New Zealand is having great success in interpreting treaty terms between Maoris and New Zealanders. The Ontario Indian Commission is another forum that is having good success in facilitating agreements between First Nations of Ontario, the Ontario Government and the Government of Canada.

It is recommended that a special tribunal be established to deal with aboriginal issues. The tribunal should be one which can make recommendations to the Governments, facilitate agreements and arbitrate disputes if the parties are in agreement. It should have less legalistic rules and procedures than the conventional courts and be required to make an annual report to the Parliament of Canada.

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Access to Civil Justice

Introduction

The present civil justice system is held in high regard by most people in Canada. For most people it is the institution which they most believe in, because it represents equal treatment; it reflects Canadian values; it serves to control abuse of power; and it tries to protect human rights and civil liberties.

Little, if any of this, is true for aboriginal people when they express what they think of the civil justice system. For them the justice system, lawyers, police etc. represent a foreign system and one which does not act as their protector but rather the enforcement of foreign values and foreign laws upon them.

How and why can there exist such different perceptions of the Canadian justice system? How does this affect access to the civil justice system for aboriginal people? What other factors prevent aboriginal people from accessing the civil justice system?

This paper will explore accessibility for aboriginal people and then suggest some practicable ways to solve these access problems.

Problems of Access to the Civil Courts

Cultural Differences

No analysis of this problem is complete without a focus on the history of the relationship which has developed between aboriginal and non-aboriginal peoples.

The British during the early colonial period accepted and recognized the many aboriginal Nations as entitled to govern their own affairs within their territories.

They were perceived as independent Nations because they exercised a degree of governmental authority sufficient to maintain order. The notion of sovereignty

had not at that point developed to the level of rigidity and categorization which it later came to have. This policy was in fact enunciated to a degree, in The Royal Proclamation of 1763.

During the period 1763 until the late 1800's, land was acquired from the several aboriginal nations through the Treaty process (a process where rights and compensation were given to the aboriginal peoples in return for their land).

Also during this period, the policy of treating aboriginal people as equals began to change. The colonial governments began to ignore previously recognized jurisdiction and aboriginal rights and began to treat aboriginal people generally as savages. By 1867 when Canada was born, the Federal and Provincial Governments had assumed full sovereignty over the aboriginal peoples. In 1876, the present Indian Act was imposed on aboriginal First Nations; it had the effect of virtually controlling every aspect of the aboriginal person's life and treated aboriginal First Nations like municipal governments. This was the beginning of a forced adaptation to the dominant societies' laws and justice system. It represented a tremendous change for aboriginal peoples from their laws and systems.

For example the Nisg'a Indians of the Northwest, who had highly developed systems of law, land use, land care, etc., were forced to conform to laws which the Nisg'a knew nothing about. The new laws had a different philosophical basis and were the product of a totally different culture. Where previously their traditional laws had required them to treat the land with respect, acting in a stewardship role and adhering to communal values, the new european land law system dealt with individual ownership and an exploitation philosophy. Similar conflicts were evident with respect to their traditional marriage laws, distribution of property, child custody and adoption laws; for the most part aboriginal people were totally unfamiliar with any of these new laws. Additionally, the dominant

system settled disputes in a much different way. Where previously disputes were settled through a mediated or conciliated approach, now disputes were conflict-oriented and adversarial in nature. The new resolution process was completely antithetical to their traditional dispute resolution systems.

In most instances aboriginal peoples continued to use their traditional laws and institutions but at the same time they had to conform to the dominant culture's laws and values. To aboriginal people this meant a tremendous change --adjusting to a new lifestyle and to new values and institutions. Many aboriginal people are still in the process of adjusting; others failed to adjust and still others did not want to adjust.

Today there is still an undecided issue of whether aboriginal people gave up their right to govern themselves and to apply their own laws within their traditional land base; the Supreme Court of Canada has never had to determine this issue. In 1984, the Gitksan Wet'suwet'en Tribal Council sued the British Columbia Government, claiming that those tribes had never given up this right. This is not a frivolous action; lawyers for the Attorney General of British Columbia and the Federal Government are taking this very seriously. The trial is now at the Supreme Court of British Columbia level and will probably still take some months before all the evidence has been heard. The case will eventually go to the Supreme Court of Canada where this issue will be definitely answered.

Statistics today prove that aboriginal people have had a difficult time adjusting. Although aboriginal people represent only 3% of the total population of Canada, they represent 10% of the Federal inmate population. In some provincial institutions, the population of aboriginal people is in excess of 30%. The rate of suicide among aboriginal people is 6 times the national average. The likelihood of aboriginal children being taken away from their family and community and placed in the care of a welfare agency is 5 times higher than for non-aboriginal

Children. (These figures are based on Government figures cited in the Report of the Special Committee on Indian Self-Government).⁽¹⁾

The above described cultural differences and laws continue to be a problem for aboriginal people and the civil justice system. The civil justice system as it presently operates, still administers and enforces values and legal rules that often do not fit with traditional laws. Aboriginal people have over a long period of time, lost confidence in the present system. They see the present system as biased against them. For them there is no difference between family law, civil law and criminal law; it is all one justice system which is biased against them. It is not just perceived bias but it is actual bias. The Donald Marshall inquiry in Nova Scotia and the J. J. Parker inquiry in Manitoba are but illustrations of part of this bias.

John Hylton, in his article "Locking up Indians in Saskatchewan: Some Recent Findings" in Deviant Designations, Crime, Law and Deviance Canada, edited by Flemming and Visana, 1983, found that a 16 year old Indian boy had at least a 70% chance of being locked up in prison by the time he was 25 years old. The corresponding figure for a non-Indian in Saskatchewan was 8%.

Another ready example of bias is in the child welfare area. Statistics earlier established that a disproportionate number of children have been apprehended in the past. The legal process in this area is premised on beliefs which are antithetical to fundamental aboriginal values: it assumes 'rich is better'; aboriginal children should receive the same services as non-aboriginal children; and cultural factors are not relevant in proceedings under the child care legislative regime. Common reasons for apprehension: poverty, alcoholism and cultural differences, cannot rationalize the alarming numbers of aboriginal child

(1) The Penner Report, Indian Self-Government in Canada 1983, p. 14-15

apprehensions. For aboriginal people, ignorance and racism are as responsible for aboriginal child apprehensions as is compliance with biased standards.

Aboriginal peoples have also experienced major difficulties at the collective rights level in dealing with the civil justice system.

In one of the first cases to decide what rights aboriginal First Nations had to their land, St. Catherines Milling (1889) 13 A.C. 46, the Judicial Council of the Privy Council decided that aboriginal First Nations had rights to land but that those rights were in the nature of personal and usufructory, and dependant on the goodwill of the sovereign (words which have never been given a clear meaning but are certainly less than the fee simple rights that non-aboriginal people assert over their land.)

Treaties, which aboriginal peoples considered to be agreements between sovereign nations, fared no better. In Regina v. Syliboy, (1929) 1 D.L.R. 307 (Nova Scotia County Court) hunting rights under a 1752 treaty were in issue. The court held that the treaty document was meaningless and not a treaty. It was not until Simon v. The Queen, (1985) 2 S.C.R. 387, that the Supreme Court of Canada reversed this ruling. Chief Justice Dickson rejected the reasoning of Mr. Justice Patterson in the 1929 Syliboy decision. He commented:

"It should be noted that the language used by Patterson J., illustrated in this passage, reflects biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian Law and indeed is inconsistent with a growing sensitivity to native rights in Canada." (at p. 399).

There has been a remarkable shift in attitudes toward aboriginal peoples and this shift is beginning to be reflected in rulings of the courts.

Guerin v. The Queen (1984) 2 S.C.R. 335, is an example where, the Supreme Court of Canada held that aboriginal rights to reserves were rights surviving from the pre-contact aboriginal legal order. The Nowegijick case (1983) 1 S.C.R. 29 at 36, established that treaties were to be interpreted not according to their technical meaning of their words but in the sense that they would naturally be understood by aboriginal peoples. This is a dramatic change in the Canadian civil justice system which in 1945 recognized no aboriginal rights which were not granted by constitutional or legal provisions; treaties then had no definable legal status.

This judicial shift in attitudes has also created contradictions which have yet to be resolved. An illustration is Jack and Charlie v. The Queen, (1985) S.C.R. 332. Evidence in that case established that the two aboriginal people had been hunting for religious purposes. The fresh meat was to be burned to satisfy the spirit of an ancestor, believed to be present in the area. Acts to placate the spirits of the dead are generally unfamiliar to Canadians, but are widespread in other parts of the world, particularly among tribal peoples. The case arose before the 1982 constitutional amendments protecting freedom of conscience and religion and the argument was that a religious exception should be made, to prevent the applicability of the provincial hunting law. The court seemed unconvinced that a valid religious activity was involved and upheld a conviction against Jack and Charlie.

Generally speaking, aboriginal peoples want their treaty rights respected. Since treaties have never been explicitly or directly terminated, they consider them as valid and comprehensive today as they were prior to the proliferation of legislation that now significantly restricts their meaning and force.

Central to the aboriginal perspective of treaties is the concept of 'spirit and intent'. This means a variety of things to different aboriginal peoples since the circumstances surrounding each document vary. For aboriginal peoples generally, this includes freedom from a variety of regulations and restrictions imposed on their societies against their will and without their consent.

Their concept of spirit and intent touches upon a wide range of matters: the establishment of nation to nation relations; the establishment of military and trade alliances; tribal autonomy and jurisdiction; co-existence and sharing of lands, waters and resources; the provision of health, education, social services and economic benefits. In short this concept suggests that aboriginal peoples view their treaties as a collection of mutual guarantees, political and social compacts and a process for dealing between them and the government.

Aboriginal people also want their general claims i.e. claims by aboriginal people where no treaties were signed by the aboriginal people but the governments took the land from the aboriginal peoples, respected. Aboriginal people say they have rights over these lands and that other aboriginal rights flow from their claim to rights over these untreated lands.

Following Calder v. Attorney General of British Columbia (1973), S.C.R. 313, the federal government developed policy dealing with "specific claims" which imposed a "lawful obligation" on Canada to provide a remedy. These claims would involve cases where aboriginal people alleged maladministration of lands and assets or breach or non-fulfillment of treaty obligations.

A specific claims branch was established in the Office of Native Claims of the Department of Indian and Northern Affairs with a mandate to review claims, to provide assistance in documenting the claims and then to forward completed claims to the Department of Justice, who would determine if there was a lawful obligation on the part of the Federal Government. The specific claims branch

would then enter negotiations with the aboriginal claimant to determine the appropriate remedy - usually money compensation. If the claim was at any time determined to be ill-founded or negotiations broke down, then the aboriginal claimant would be left to drop the claim or pursue it in the courts. At the present time there are more than 500 of these claims and the numbers are growing.

The Federal Government also developed a comprehensive claims policy; where such claims had not been extinguished by treaty or superceded by law, they were to be negotiated. Apart from the James Bay Settlement, the only real progress was the agreement-in-principle reached with the Inuvialuit, which was motivated by a desire to clear up title in case there was large scale energy developments. The prospects for significant progress on most of the claims remain dim. The Nisg'a claim has been under negotiation for over ten years and yet they still have not reached any agreement. There are now over 20 such claims ready for settlement. At the present rate of settlement the claims will take over 100 years to settle.

Increasingly, aboriginal claimants are turning to the courts, because the negotiation process has not worked; but they are not necessarily the best forum to resolve these kinds of disputes.

There are many reasons why courts are considered by the aboriginal peoples to be inaccessible or inappropriate for the resolution of First Nations specific and general claims. First, considering the huge number of complex issues to be resolved, courts are expensive and time-consuming. Generally First Nations require the assistance of the Federal government to supply them with the financial resources to prosecute an action; frequently it is the same Federal government against whom the suit is initiated. On the other hand, governments seem to have limitless resources to appeal unfavourable decisions or to themselves initiate an action.

Second, the legal system is ill-equipped to resolve issues which are essentially political in nature.

Third, the civil justice system has done a good job of quaranteeing rights of individual persons against governments but have not dealt adequately with collective rights. This is a particular concern to First Nations because many of the rights they are claiming or defending are group rights.

Fourth, rules of evidence and procedure may prevent aboriginal cases from receiving a fair and just consideration. Strict adherence to the hearsay rule in the Gitksan Wet'suwet'en case, for example, would prevent the aboriginal people from establishing a valid claim; their history was based on an oral tradition. To win a case therefore, an aboriginal party might be forced to adopt an approach or an argument which conflicts with their beliefs.

Fifth, once an issue goes to court the parties lose control. The adversarial process does not allow issues to be resolved in an agreed upon manner. The court often relies upon narrow legal or technical interpretations, which are usually unsatisfactory for both sides.

Nevertheless, some issues will go to court, with the expectation that the court action will bring pressure against the parties to resolve the dispute themselves. There is a growing realization, which should be emphasized, that the present civil justice system cannot cope adequately with the wide variety of issues involving aboriginal First Nations and governments. Yet first Nations are turning increasingly to the courts, not because they hold the solution, but because the other processes are either unworkable or unproductive. If First Nations cannot obtain relief from the present civil justice system, something must be done to put in place a new process or to make the present system more workable.

Lack of Meaningful Representation by Aboriginal Lawyers and Judges

Assuming that courts are willing to take into account the uniqueness of aboriginal culture and traditional law, how does the aboriginal person or First Nation have his/their special perspective represented in court? In 1973 there were only four law school graduates in the whole of Canada of aboriginal ancestry -- 2 of whom were provincial court judges. Since then those numbers have increased, in part because of innovative and affirmative action programs at some law schools. There are now 114 graduates from law schools across Canada. However, if Canada's aboriginal population is to be adequately represented, there should be 1500 lawyers of aboriginal ancestry.

Furthermore, there are only three judges of aboriginal ancestry in Canada, presiding within the general court system. Even Justices of the Peace of aboriginal ancestry are extremely uncommon except in the Yukon and Northwest Territories, where a conscious effort by the territorial governments to recruit aboriginal people to serve in that capacity, has been underway for a number of years. Although Ontario embarked upon a special initiative to recruit more aboriginal Justices of the Peace, there has been only 2 appointments of full-time Justices of the Peace and some part-time appointments.

There are also few non-aboriginal lawyers in Canada who have any understanding of the law as it relates to aboriginal people and their unique status within the Constitution of Canada. This is not surprising as in 1988, of the twenty-two law schools in Canada, just over 45 per cent indicated they were teaching a course or seminar in the native law area. Only one school, U. B. C. was teaching more than one course. These statistics are not encouraging. They may be explained partly

on the basis that the legal profession could only get involved in an aboriginal claim since 1951. Prior to that time the Indian Act made it an offence for any lawyer to accept a retainer from an aboriginal person to prosecute any claim, for a band or tribe, without the consent of the Superintendent of Indian Affairs.

Of the continuing legal programs offered by the different provinces, only British Columbia, Saskatchewan and Ontario indicated they had offered any continuing legal education in the native law area. It is little wonder then that aboriginal people have little confidence in the civil justice systems to have their perspective represented properly in court or for that matter for the court to understand their unique status.

Socio-Demographic Problems

It is a trite proposition that social and demographic factors affect accessibility to the justice system. The justice system is based on the principle of universality and equal access. But these principles just do not apply when you cannot afford a lawyer because you are not working. They do not apply to someone, who because of his/her education background has little, if any, understanding of the law or their rights. They do not apply to someone who is unfamiliar with the justice system and how to use it. These are all problems based on socio-demographic restrictions and common to aboriginal people throughout Canada.

In 1981, census data showed that employment for status Indians aged 15 and over was 38%. This compared with 60% for the national average. The official unemployment rate was 2.5 times the national average and nearly 3.5 times the national average for Indians in the ages 15 to 24 years.

In 1980 the average annual income of the general population of Canada was one

and two thirds (1-2/3) greater than that of the status Indian population. Also, there were significant differences between status Indians and the overall Canadian population with respect to source of income. In particular, in 1981, government transfer payments (welfare) supplied 35% of status Indians with a source of income, compared to 16% of the general population. Aboriginal people do not have equal access to the civil justice system because of their socio-demographic background, but when they do need help, they need a lawyer who deals with "poor people problems" -- welfare and social assistance appeals, unemployment insurance, workers compensation and pension. Typically lawyers do not practice in this area because there is little money to be made. If a lawyer does practice in this area, it usually is a Legal Aid funded lawyer or a staff lawyer for legal aid. This is confirmed by the following survey. In the summer of 1982 the Native Law Programme Branch of the Legal Services Society of British Columbia, surveyed bands and lawyers working in "Indian Law", to establish information for the use of lawyers, legal information counsellors, and Indian bands to assist aboriginal people in British Columbia with their particular legal problems. One of the questions asked was:

"In order of priority what legal, administrative or procedural problems do you think are most commonly faced by Indian people?"

The responses were as follows:

- (1) Criminal matters (theft, breaking and entering, drunk driving);
- (2) Welfare and Social Assistance applications and appeals (unemployment insurance, worker's compensation, pensions, welfare);
- (3) Family relations (marriage separation, divorce etc.);
- (4) Hunting and fishing rights;
- (5) Child welfare (apprehension, birth, adoption);
- (6) Land use problems (rights of way, easements, water rights);

- (7) Department of Indian Affairs;
- (8) Consumer and credit problems;
- (9) Access to health and medical care;
- (10) Membership and Indian status problems;
- (11) Employer/employee relations;
- (12) Taxation;

When asked what type of legal problems are unique to Indian people they replied:

- (1) Aboriginal and treaty rights;
- (2) Alcohol related problems -- drunk driving, assault
- (3) Problems and procedures under the Indian Act -- application of provincial laws under S.88, loss of status, band elections;
- (4) Language and cultural problems i.e. interpretation problems, no understanding of Court proceedings, child apprehensions, etc;
- (5) Constitutional position i.e. status under the constitution.

The last question and response strongly indicates that aboriginal people are still trying to determine which laws apply to them as aboriginal people and which ones do not. It is going to take some time before aboriginal people understand what laws apply to them, what that law means and how to access these rights through the courts. There is a real educational problem.

Geography

According to the 1980 census, approximately 71 per cent of all aboriginal people in Canada still live on the reserves. Many of these reserves are located in isolated areas of the provinces. The sheer physical barrier of distance denies aboriginal people access to lawyers and courts. The time and expense for

aboriginal people and non-aboriginal people to travel to see a lawyer or get to a Court is prohibitive. Additionally, most lawyers practice in urban areas and are themselves inaccessible to people living in remote communities.

Education

Aboriginal people tend to have a low level of education in comparison to the general population. The "retention rate" for aboriginal students from grade 2 to graduation at grade 12 as of 1984-85 was 31%, up from 18% in 1975-76. If we compare education attained while living on a rural reserve and living in an urban setting -- only about half as many as the out-of-school aboriginal population on rural reserves had post-secondary education as compared with those in urban reserves, although numerically they were split about 11,000.

Culture

As pointed out already, aboriginal people are unfamiliar with such concepts as the "adversarial system", "legal rights" and "lawyers". The system which faces an aboriginal person from a civil justice standpoint is totally unfamiliar. I was reminded of this recently when I was referred a client by the Department of Indian Affairs and Northern Development. A young woman had lost her husband in an automobile accident. As he was her sole means of support she had applied for welfare. Someone from D.I.A.N.D. in settling her husband's estate, recognized that she had a good personal injury suit. Had it not been for the official from D.I.A.N.D., the young woman would never have known any better.

This section of the paper will consider the establishment of aboriginal courts by looking at:

- (1) What other countries have done to recognize aboriginal laws.
- (2) What is the jurisdiction in these courts, especially over civil matters?
- (3) What are some of the methods which might be used to establish such courts in Canada?
- (4) What are some of the jurisdictional issues?
- (5) Why these courts should or should not be established.

Recognition of Aboriginal Laws in other Countries

United States Experience

Tribal Courts in the United States are of three kinds: (1) the traditional courts; (2) the courts of Indian offences and (3) the tribal courts.

The traditional courts are the smallest group, numbering some 18 and operating among the pueblos of the southwest. The laws which are enforced are based on long-standing tribal custom. The Tribal Governor with or without his council adopts the role of judge in relation to any legal disputes within the tribe. It has exclusive jurisdiction to decide civil matters between tribe members within the tribal jurisdiction and between a non-member and a member dealing with a dispute within the tribal jurisdiction.

The second group of courts, the courts of Indian offences, were established to force cultural assimilation by outlawing traditional cultural institutions, eliminating plural marriages, weakening the influence of medicine men, promoting law and order, civilizing the Indians and teaching them respect for private property. These

courts were staffed by the local Indian Agent who applied the law as defined by an abbreviated criminal and civil code. Customary law was ignored or outlawed, as it represented a way of life that the court was designed to destroy. The current Courts of Indian Offences apply all relevant federal law, rulings of the Department of the Interior, any tribal ordinances or customs not inconsistent with federal law and the specific provisions of the Code of Indian Tribal Offences. The operation of these courts has been the subject of considerable criticism.

The third form of Indian courts are the Tribal Courts established under The Indian Reorganization Act of 1934 which authorized tribes to adopt their own constitution, establish a tribal government and enact laws governing their own internal matters. It envisaged tribal courts based on western conceptions of adjudication. Today there are substantial variations between the operation of different tribal courts; in some cases the tribes appoint their judges and others elect them; terms of office vary from tribe to tribe, although two to four years are common. The quality of Judges, the prevalence of an appeal system, the applicable law, the facilities and support staff, the ability to enforce orders, the use of customary law, and the sophistication of the court system varies greatly from one tribal court to another.

Tribal courts have exclusive jurisdiction over all civil matters within their tribal territory unless their constitution precludes the exercise of jurisdiction in specified areas; this includes a non-Indian suing an Indian over a claim arising in the tribe's territory. The Indian however has an equal protection right to avail himself of state courts under the above circumstances. State courts do have jurisdiction when a

Language

A substantial proportion of aboriginal people do not speak or read English well. Even with interpretation available, a simple legal procedure becomes a complex arena of misunderstanding because of this unfamiliarity.

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Solutions to Accessibility to Civil Courts
for Aboriginal People

There are a number of proposals, which are both practicable and feasible, to make civil courts in Canada accessible to aboriginal people. The main problems which I have identified earlier are summarized as follows:

1. Aboriginal People have been conditioned to mistrust the Canadian Judicial System, part of which includes the civil court process, i.e. a perceived bias against aboriginal people;
2. The Canadian justice system has not recognized aboriginal customary laws; laws which have been used, in some cases, for thousands of years and therefore denies aboriginal people their right, in international and Canadian law to self-determination;
3. The adversarial system, used by the Canadian judicial system, is antithetical to the traditional aboriginal dispute resolution system;
4. The aboriginal people in Canada are unfamiliar with the courts and their rights as Canadians, in the context of Federal and Provincial law;
5. Until recently, there has been an obvious lack of representation for aboriginal people in the Canadian judicial system by aboriginal lawyers and judges;
6. A majority of aboriginal people have incomes substantially less than the average Canadian, and as a result, many of the problems which aboriginal people experience are "poor people problems". Lawyers generally do not want to deal with "poor people problems".
7. The time it takes to solve their legal problem is something which aboriginal people cannot accept.

8. The cost of having a civil suit adjudicated by the court, is prohibitive;
9. The socio-economic position of aboriginal peoples make the courts inaccessible.
10. The civil court system is an inappropriate forum to resolve issues dealing with claims and aboriginal rights.

To solve these problems I have proposed solutions based on three broad approaches. First, there are disputes of a private individual nature involving an aboriginal person and a non-aboriginal person or one of the governments. It would seem that these disputes should be settled by the present civil courts. So what can be done to ensure that the civil courts are accessible to aboriginal people or other people in similar circumstances as aboriginal peoples?

Secondly, there are disputes which are of a civil private nature but are between two aboriginal people from the same community or from another aboriginal community. It seems preferable, and indeed feasible, to have these disputes resolved by the aboriginal community and according to their laws and standards.

Third, there are disputes which are of a public law nature which involve community aboriginal rights on the one hand, and either the Canadian or provincial community or private law rights on the other hand. There are increasingly more disputes of this nature which the civil courts are being asked to resolve. It is questionable whether the present civil courts are necessarily the best forums to settle these kinds of disputes. If we do use the present civil court system to resolve some of these disputes, what can be done to ensure aboriginal people get a just resolution of their disputes, and are there other para-court forums which can be implemented to resolve these types of disputes?

How do You Accomodate Aboriginal People Within Our Present Civil Court System
In Private Law Matters?

One of the fundamental ways to accomodate aboriginal peoples in the present system is to give them information about the system and about the provincial and federal laws. Most aboriginal people do not understand the present judicial system and they are unfamiliar with laws which affect them. They are also unsure whether all laws apply to them as aboriginal people.

Legal Services Societies and other Public Legal Education Societies in Canada have recognized this as a problem for some time and have attempted by various methods, to provide information to aboriginal people. If this information is to be understood, it must be developed in conjunction with or by aboriginal people themselves.

Aboriginal people face unique legal problems as a result of their constitutional status, and this kind of information must be provided to aboriginal people in a way which aboriginal people understand; not always is the dissemination of information by brochure or booklet effective. Partly, this is because many people at the band level are not well educated and therefore might have difficulty understanding brochures or booklets.

A better approach, and one which aboriginal people feel comfortable with, is the workshop approach conducted by trained aboriginal professionals. For example, the Native Law Program at the University of British Columbia employs this method to provide information to aboriginal people, essentially from British Columbia, on their unique constitutional rights, recognized by the provincial and federal law.

In August of 1987, one hundred and sixty delegates from bands, and Indian organizations, attended a two-day workshop at the University of British Columbia, Faculty of Law, dealing with their special tax exemption under Section 87 of the Indian Act (R.S.C. 1970, c.I-6). For two days, Indian lawyers and others, with an expertise in this area, taught the band delegates what their rights were, and then how to organize their personal and business affairs to take advantage of these rights. Prior to this workshop, few had a clear understanding of how these rights worked, even though these rights had been in existence by statute since 1850. Material was produced and given to each delegate prior to the start of the workshop. The plan was to teach one delegate from each band, who then would be responsible for taking this information back to the band, and sharing the information with others. Video proceedings were made so that one of the full time faculty members, an aboriginal lawyer, would then do follow-up regional workshops with other bands who could not attend. Other workshops are planned in the area of child welfare law, labour law, and welfare and employment law. In this way someone from the band level, (a resource person) will be able to act as a resource person for others from the band.

The program is also being used to help bands to create proposals in their development towards self-government. For example, in May of 1988, 110 delegates attend a 2 day workshop. They were given all of the relevant legal information, including looking at present working models (Sechelt Act and the James Bay Agreement) to begin the process of developing their own government structures.

This approach is but one of many ways of providing aboriginal communities, which are located in remote and rural communities, with access to quality legal

information. It is based on giving information directly to an individual at the band level who is willing to take the information back and to share it with other band members. It is oriented toward "preventative", "before the fact", legal information rather than "after the fact" information.

Accessibility and availability are also affected by the geographical location and by the size of the population of the aboriginal group. Legal services for example provide community law offices in some areas, while court workers in some provinces, provide representation, information and counselling in many other areas. But even these services cannot provide legal information of the quantity and quality that aboriginal communities are looking for. The following comments are not uncommon when aboriginal people assess these services:

"few services are offered to native people, most of these services are: overworked, underfunded and understaffed -- thus not as effective as they could be"

Native Courtworkers, being one of the best and most utilised services available to aboriginal people, is a good example of a service which has had to limit the scope of its services because it is overworked, understaffed and underfunded.

Even when legal information and advice is available to aboriginal people, they often do not take advantage of these services because it is not presented to them in a form which is compatible with their lifestyle and culture. In short, if the information and service provided is not aboriginally oriented, then the result will be that aboriginal people will not use the service.

It is suggested that where legal information is provided to aboriginal people it

should be:

1. Information and service which is aimed at dealing with specific legal problems affecting aboriginal people.
2. Information and service which is attractive to aboriginal people because
 - (i) it utilizes aboriginal artwork and design in pamphlets, brochures and materials.
 - (ii) it uses language which is readily understood by aboriginal people.
 - (iii) it uses aboriginal people to provide the information and service.
 - (iv) it illustrates a legal problem using examples and settings which are familiar to aboriginal people.
 - (v) it provides information and service in a location that is familiar and identifiable to aboriginal people i.e. preferable in the aboriginal community.
3. Developed by aboriginal people or aboriginal people should be intimately involved in developing and providing the legal material and services.

An excellent example of the potential for providing this kind of information is the project initiated by the University of Victoria in British Columbia. Twenty-six band social workers (mostly aboriginal) from Vancouver Island are studying toward their B.S.W. degree. They study for one week, (8 hours per day) then go back to work at the band level for the next 3 weeks. The location selected to teach these workers is away from the University and convenient to all the twenty-six band social workers. One of the courses taught to these workers was the law as it affects social workers. The course covered, how the criminal, civil and family courts work, including the jurisdiction of these courts, the charter and what rights

are protected, federal and provincial human rights legislation, child welfare legislation, divorce legislation, family law legislation, welfare law, young offenders legislation, and aboriginal rights. The course was taught by an aboriginal lawyer who was able to explain some of the special problems of applying the various acts within the aboriginal communities. These workers were then required to write a typical law school exam. The advantages of empowering aboriginal communities with legal information in this manner are:

- (1) aboriginal people are taught by their own people;
- (2) It is developed by people who understand how their particular communities work;
- (3) the teaching methodology and setting makes it easier for them to understand.
- (4) These social workers are in fact ready-made para-legals in their communities.

This is a model which is easily transportable to other provinces. It seems to go part way to solving the problem of access to legal information and at the same time allows aboriginal communities a vital role in providing legal information on courts and laws to their own people and in a manner which they feel is appropriate.

Aboriginal people have, for some time now, been demanding more aboriginal lawyers and para-legal information people.

In 1973, when the now famous Calder decision was decided by the Supreme Court of Canada, it was estimated that there were 3 aboriginal lawyers in all of Canada. As a result of enquiries on the delivery of legal services to aboriginal people, initiatives were implemented which would ameliorate this almost total absence of aboriginal lawyers.

The Native Law Centre in Saskatoon, was established in the mid 1970's to promote the development of the law and the legal system in ways which would better accomodate the advancement of native communities in Canadian society. One of the Centre's best known activities is its annual pre-law orientation program for native law students. Established in 1973, it was a response to the obvious lack of aboriginal lawyers in Canada. The program attempts for two months, to simulate first year law. Students face the same pressures and workload that they will meet in law school, assistance is provided to help students to develop study methods and techniques to deal with the pressures of law school. Currently three subjects are taught: criminal law, tort Law, and contract law. At the end of the program the teaching group, (usually law school professors), assess each student both from a subjective and an objective law school exam standpoint. If the teaching group feels the student has a reasonable chance to successfully complete law school, the student is then recommended to first year law; each student must be conditionally accepted by some law school in Canada prior to taking the two-month program in Saskatoon. As a result of this process over 114 students have graduated from law schools in Canada. Many have gone on to become lawyers. We are now beginning to see these lawyers going back to their communities to represent their people in law suits and to help their communities in a number of different ways. In British Columbia alone, there are 22 practicing aboriginal lawyers. Tribal councils are beginning to employ aboriginal lawyers to do legal work for all aboriginal people in the tribal council area. One of the important benefits of aboriginal lawyers representing aboriginal people in court, is that they can advance the aboriginal viewpoint in a way which was previously not being done.

For example in a case heard by His Honour Judge Hutchinson, (Gawa v. Horton

and Watson, B. C. Supreme Court, Smithers Registry), in July and September of 1981, the Plaintiff, a Gitksan woman and chief of the Frog clan in her village, sought damages for personal injuries arising out of a motor vehicle accident. Evidence was presented at trial that the defendant, Watson was driving on an Indian reserve at night and hit Mrs. Gawa in the head with the passenger side mirror of his van while she was walking down the side of the road. The Plaintiff was in a coma for several days and suffered extensive personal injuries. After extensive interviews with other chiefs and knowledgeable elders, it became apparent that Mrs. Gawa had suffered more than just physical injuries. Prior to the accident, Mrs. Gawa, had been the second chief from the Head Chief of her House. As the major woman chief in her clan, she was responsible for teaching the younger women, Gitksan traditions. Furthermore, the two subchiefs, of which she was one, were responsible for advising the Head Chief and speaking on his behalf. Within the Gitksan society, feasts are still held when people die, fences are placed around graves, headstones and totem poles are raised. These events require the presence of high chiefs from all houses and failure to attend is considered to bring shame on one's name. The names of the chiefs are connected to particular territories, including hunting, fishing and berry grounds. Since the accident, Mrs. Gawa was unable to attend most feasts, and in 3 years had only attended one feast in her community. The effect of this shame on her was demonstrated by the silent ostracism she received from other chiefs in the village. Whereas, before she was injured, Mrs. Gawa was constantly involved with other members of her community, she received almost no visitors outside her immediate family, after the accident.

At trial, evidence was given as to the importance of a high chief and the effect of

an injury on a high chief. According to one chief, there traditionally was a special feast put on by chiefs who had suffered injuries to "wipe away the blood". The chief explained that a shame came upon the house when persons from other houses saw the blood of the chief upon the ground. At such feasts, gifts such as towels and other goods which symbolized the wiping away of the blood was given out.

Although none of the chiefs estimated the amount of money and goods given out at such a feast, similar funeral feasts involved over \$20,000.00 in cash as well as enormous quantities of goods being distributed by the host clan. All of this evidence was led to prove the extent of the damages incurred by Mrs. Gawa and the expenses which she would incur to re-initiate the status of her chief's name. The court accepted this evidence and awarded her money to put on a feast.

As the above example has illustrated, it is vitally important that aboriginal people have the availability of being represented by aboriginal lawyers, in order for them to be fairly represented in courts. The corollary to this proposition is that all lawyers, and para-legals, who counsel and represent aboriginal people, should have a good understanding of the traditional laws of their clients and the extent of the use of those traditional laws in modern society. Most lawyers do not even have a clear or even limited knowledge of the special constitutional status of aboriginal people in federal and provincial law. It is therefore important that law schools continue to develop courses relating to aboriginal people and that continuing legal education courses covering this area be developed for practicing lawyers.

Aboriginal people have also asked for better access to legal aid. For the above stated reason, it is important that legal aid lawyers be aboriginal lawyers or at least have a good understanding of the aboriginal culture and their traditional laws.

Most of the need for legal aid comes in the area of criminal law, child welfare and family law. In civil law areas, i.e. personal injury, hunting rights, contract law etc., it is doubtful whether provincial governments have the resources to ensure that aboriginal people be provided with legal counsel.

It is unreasonable to expect individual aboriginal people, as a result of their disadvantaged economic position in society, to litigate many civil suits to protect their group rights. It is also clear that the Federal Government has been in the past, in a conflict of interest situation where aboriginal rights were concerned, especially with land and resources, that no law firm would have tolerated. It is therefore important that centres be established to research and publish on vitally important aboriginal rights and to initiate and intervene in civil litigation cases which will affect aboriginal rights.

The Institute for the Development of Indian Law

The Institute for the Development of Indian Law in the United States, was established in 1971 as a non-profit corporation to 'develop a cohesive philosophy, policy and direction in Indian Law for the benefit of Indians as Tribal entities and as individuals'.

The institute is a corporation and is staffed by Indian lawyers. It publishes an Indian Law Journal, provides a legal information service and litigates in selected issues. It has had a very influential effect on how the law, as it relates to American Indians, has continued to develop.

PUBLIC INTEREST 1981

A. D. Lazar and P. Lordon, "Legal aid in the age of restraint."
(1980) 4 Can. Legal Aid Bulletin 40.

The author is a social scientist, working for the Department of Justice. He participated in an impact study of the cost of legal aid. The one thing that remained consistent was the aim of meeting needs. The author deals with the subject of fiscal restraint and offers strategies for maintaining legal aid during restraint. The decline in funding has been, in part, a response to a less hopeful belief in what legal aid can achieve as a reactive service. The effect that restraint will have depends upon whether the response is passive or active. To maintain the system will require protection of resources, doing more with fewer resources and coordination with other programs. Finally the author considers programme evaluation of this kind as an applied social science research. The author summarizes some of the potential difficulties with implementation of this type of research result and a reminder that such a study can only be a tool.

ADMINISTRATION OF JUSTICE 1982

CANADA

W. Lederman, "Current proposals for reform of the Supreme Court of Canada." (1979) 57 Can. Bar Rev. 688.

The author refers to three attempts at constitutional reform. The Constitutional Amendment Bill (Bill C-60) of the Trudeau government represents the middle ground. The Report of the Committee on Constitutional Reform by the Canadian Bar Association in August 1978 is the most conservative. The Report of the Task Force on Canadian Unity of February 1975 advocates the most change. All basically call for retention of the status quo. The issues considered in the article are jurisdiction, size of the court, regional quotas for membership, the system of appointments and the special constitutional status of the court. The article concludes with some recommendations for change but a basic retention of the status quo.

PUBLIC LEGAL SERVICE 1985 - CANADA

E. Lightman and M. J. Mossman, "Salary or fee-for-service in delivering legal aid services: theory and practice in Canada." (1984) 10 Queen's L.J. 109.

The issue is the form of legal aid: private bar or salaried lawyer in a clinic. The article examines predicted outcomes from fee-for-service and salaried lawyer legal aid, the impact of national economic restraint on both, the actual legal aid programs in Canada and compares the 2 modes according to standard criteria of effectiveness, efficiency and feasibility. The authors conclude that one can't determine either effectiveness or efficiency without defined goals. Relative costs involve 3 factors. Feasibility really involves a consideration of ideology and here we have two conflicting ideologies, the private market v. the efficient use of scarce resources. The authors conclude that support for clinics should be maintained and increased.

ADMINISTRATIVE PROCEDURE 1978

M. Loughlin, "Procedural fairness: a study of the crisis in administrative law." (1978) 28 U. Toronto L. J. 215.

The author is concerned with judicial review of administrative decisions and the Anglo/Canadian doctrine of procedural fairness. The author uses the model described in D. J. Mullan's article on fairness as a starting point in the analysis of recent developments and adopts Trubek's criteria for analysis of the problem. The traditional model is in concert with the Rule of Law. The author considers procedural fairness in Britain and Canada and theoretical implications of adoption of a flexible standard of fairness in administrative law. It is the author's contention that the real problem stems from a contradiction within the traditional model which clouds perception of the difficulties and complexities faced by the court in trying to apply the doctrine of fairness.

ADMINISTRATION OF JUSTICE 1979

CANADA

N. Lyon, "Provincial courts and the administration of justice."
(1979) 3 Prov. Judges J. 3:3.

Professor Lyon provides an impressionist survey of the provincial court system in Canada as a result of an informal personal survey. The author concludes that the quality present in the courts is excellent. The public attitude towards the provincial courts is the result of both the press and the attitude of senior judiciary and the Bar. A negative stereotype has evolved and it is critical that superior court judges have a change of attitude. The role of the Attorney General has also been subverted by a negative attitude, a cynicism. It is essential that it not be a political or partisan appointment, and that the Attorney General recognize and foster an attitude towards provincial court judges which supports judicial independence. Judicial education has a place as has an effort to recognize other court officers. Whatever is divisive must be avoided. The author offers a functional model for a reformed provincial court system which includes a central trial court. This system would absorb the county and district court system. Finally the author deals with the constitutional problem of such a model.

ADMINISTRATION OF JUSTICE 1981

ONTARIO

W. D. Lyon, "Bilingual trials in Ontario." (1981) 5 Prov. Judges J. 24.

It is the intent of the bilingual policy that a French speaking accused in a criminal matter can be tried by judge or jury who understand French. Evidence should be given in the language of the accused and transcribed in that language. Where there is a problem bringing the accused before a bilingual judge, there may be a change of venue to a place or court designated as bilingual. Civil cases are generally held in English.

ADMINISTRATION OF JUSTICE 1985

D. K. McAdam, "Winnipeg on the civil side." (1985) 9 Prov. Judges J. 3:26.

The author summarized presentations made at the Bar Association's annual meeting of provincial court judges on the Civil Division. The disparity between approaches in different provinces was noted as was the value of the shared experience of the members of the bar.

ADMINISTRATIVE PROCEDURE 1978

R. MacDowell, "Law and practice before the Ontario Labour Relations Board." (1978) 1 Advocates Q. 198.

The author provides a history of collective bargaining legislation up to 1950 and the establishment of the Ontario Labour Relations Board. The author's purpose is to provide a summary of rights guaranteed by The Labour Relations Act which applied only to the Ontario private sector. The Board became responsible for the statutory scheme and dealt primarily with certification of bargaining agents and determining who would be appropriate bargaining agents. They dealt with disputes arising out of collective agreements. However, the Board was not a labour court. Both the superior courts and the provincial courts enforce decisions of the Board. The author describes the procedure and remedies available from the tribunal. The act deals with general collective bargaining rights rather than the rights and remedies of individual employees which are only incidental. Decisions of the Board are reviewable.

COURTS 1985

A. W. MacKay, "Courts, cameras and fair trials: confrontation or collaboration?" (1985) 8 Prov. Judges J. 4:7.

This paper was delivered at the annual meeting of the Canadian Association of Provincial Judges in Newfoundland on September 26, 1984. The author deals with the issue of accessibility without drama in the courtroom and the use of the media to provide it. The rights of the public and press are balanced against the rights of the parties. The author explores the various Charter provisions at work (Section 2b, 11d, 7, and 1). He canvasses the American experience. Only Ontario has a statutory bar on cameras in the courtroom.

The author balances the arguments for and against television access to the courts. In favour of access he cites public education, greater reporting accuracy, improved quality of performance, the evolution of media legal experts, and the minimal disruption which would occur. Against the use of cameras he argues that television may distort the proceedings if the contents are edited, the lack of training of the reporters, the potential for "show boat" in-court tactics and the fear of "trial by media".

The author concludes that an absolute bar violates freedom of the press and that lawyers must help journalists to understand what is happening in court. There needs to be a clear articulation of the ground rules. Cameras might be more appropriate in the Appeal courts than in trials. The problem is a difficult but not insurmountable one.

ADMINISTRATION OF JUSTICE 1983

ONTARIO

C. D. McKinnon, "A brief proposing the merger of the High Court of Justice with the County and District Courts." (1983) 17 Gazette 108.

McKinnon discusses the Ontario Law Reform Commission Report on the Administration of Ontario Courts which recommended the merging of the High Court of Justice and the county and district courts. The author focusses on the interests of litigants and, mor generally, on the administration of justice. The author reviews confusing areas of jurisdiction as they exist and advocates change. The new system would retain its regional nature, be unified and decentralized. He cites the main arguments against the merger and responds to them. The concerns include the isolation and insulation of judges, the need for the appearance of separateness for appeal purposes. The author concludes, however, that expediency and accessibility require the change and merger.

PUBLIC LEGAL SERVICE

CANADA

J. G. Marchessault, "Constitutional aspects of legal services in Canada." (1979) 3 Can. Legal Aid Bul 282.

The author addresses the issue of which government, federal or provincial, has the right to legislate in the area of legal aid. Although all provinces have legal aid programs only 8 have chosen to legislate in this field. Generally administration of such a program is independent of the government. Three provinces have their provincial Bar administer the plans. Some provinces use salaried solicitors and some private practice. Most provinces provide services which cover both civil and criminal law matters. Provinces determine eligibility criteria but the service must be provided to all citizens and to those facing life imprisonment. There is a federal/provincial funding apportionment agreement. There has been no litigation regarding constitutional distribution of powers between the two orders of government in regard to legal services. The existence of the system serves the constitutional need for a right to legal counsel before the courts. The author considers the constitutionality of the system under a number of heads and concludes that although the constitutional jurisdiction over legal services cannot be ascertained directly, certain essential components of the system establish principles which help guide a jurisdictional division.

ADMINISTRATION OF JUSTICE 1986

CANADA

R. Martin, "An open legal system." (1985) 23 U.W.O.L. Rev. 169.

Elements of an open legal system include the right of citizens to have the widest possible freedom to discuss the workings of state institutions, physically open and accessible institutions, and public accountability by those who run the institutions. The author deals with deficiencies in the Canadian legal system in these regards. The law of contempt limits access by the citizenry, as do controls on publication of selective information regarding judicial proceedings and scandalizing the court by trying to bring a court of judge into contempt. Contempt cases require "show cause" hearings requiring the accused person to establish his innocence, a reverse onus. The author feels that the prospects for reform of this system are not currently good. Weak arguments for protection of judges are accepted and redefinitions of the offences are little improvement. There seems to be some confusion as to the right of judges to speak out as evidenced by the Berger affair. The test appears to be one of "acceptable judicial behaviour". Procedures are in place for judicial discipline. The author raises the issue of patronage appointments to the bench. The law societies of each province hold a disciplinary power over their members in order to maintain acceptable behaviour. The author argues that the sum total of the above results in an institution which is not fully public.

PUBLIC LEGAL SERVICE 1985

T. J. Melnick et al, "Legal aid today; a report." (1985) 43 Advocate 27.

The issue is public acceptance of legal aid. The author defends its use in B.C. by describing the statistics in areas where the public might feel there is abuse. Despite congestion in the courts, access must not be limited for economic reasons. B.C. has an inflexible poverty-line limit on eligibility. The number of foreigners using the system is low as are groups which the public might not consider to be deserving such as drunk drivers and narcotics dealers. Legal aid is not a luxury and is restricted to what is necessary. Despite the very low tariffs the legal profession has continued to support the system. Government restraints on the system are, however crippling it. The article ends with a number of supporting letters from members of the bar.

PUBLIC INTEREST

P. M. Mercer, "The citizen's right to sue in the public interest: the Roman actio popularis revisited." (1983) 21 U.W.O.L. Rev. 89.

Mercer questions who should have standing in public law litigation. He reviews the history of the relator action whereby a private individual may apply to restrain interference with a public right or to stop a public nuisance. Generally this power to raise public law issues has rested with the crown. The current system provides for three types of representation of the public interest; the Attorney General, a limited private Attorney General and the "organizational" Attorney General. The availability of such systems depends upon the judicial control in the system. The Actio popularis represents one of a group of actions which could be brought by any one among the people and originates in Roman law. It may be compared to the Relator action although it is narrow in scope and penal in nature. The actio popularis does not appear to have caught on in European legal systems. Similarly, in the English and Commonwealth law an individual damage is required for proceedings to be instituted. The actio popularis is too limited to be of use to us in our necessary development of public interest law.

PUBLIC LEGAL SERVICES 1979

CANADA

P. Morris, "Sociological research in legal services." (1978) 2 Can. Legal Aid Bul. 245.

The author entered into a sociological study of legal services, aimed at a procedural reform rather than a structural one. The researcher's concerns were not efficiency but long term consequences and solutions. The author concluded that the definition of need as defined by lawyers was a reactive one and not one which went to the root of the poverty which created the need. The system creates dependence rather than supporting the values of independence and self-help. However the explicit purpose of a social policy which produces public legal services is in fact to provide solutions to disputes which are in their very nature social and represent different interests. The author concludes that there has been essentially no fundamental questioning of the assumptions underlying the legal system and its role. He questions what lawyers actually do in relation to their clients and their clients' expectations. Any questioning or research on the legal system, it is held, must be viewed in the context of social economic and political systems in order to be of value in reform.

ADMINISTRATION OF JUSTICE 1984

ONTARIO

M. E. Morton and W. G. West, "An experiment in diversion by a citizen committee." [1983] *Current Issues in Juvenile Justice* 203.

Diversion is an informal process of non-criminalization and de-institutionalization. The author deals in particular with the Young Offenders Act. An experiment was undertaken in Kingston to deal with first time juvenile offenders. Consultation with family, the offender, the police, victim and a committee result in a voluntary agreement of an alternative to imprisonment or other judicial intervention. Research coming from the Frontenac diversion project attempt to measure its effects compared to the traditional approach. The research showed that there were impossible numbers of actual offences, far more than the justice system could handle. Although the program appeared to be successful the results must be seen in light of police discretion in the matter. In terms of court versus committee hearings, it appeared that juveniles found they understood what was happening to them better in the less formal system. However, it was questionable whether participation was in fact fully voluntary or the result of misunderstanding about the court system itself. Recidivism was not affected by the use of the committee method. Impact upon the community cannot be determined at this time. . The author concludes that the experiment's success may be the result of improvements within the court system rather than success of the diversion method and care should be exercised.

PUBLIC LEGAL SERVICE 1984

ONTARIO

M. J. Mossman, "Community legal clinics in Ontario." (1983) 3 Windsor Yearbook Access Justice 375.

The author reviews the history of the community law clinics established in Ontario with full funding, and their express goals. She expresses a concern over the potential for controls over the clinics and a loss in their power to represent the constituency for whom they were created. Their scope must include systemic legal problems of the poor and not just ad hoc remedies. She distinguishes the fully funded independent clinics with the judicare system and discusses their relationship in Ontario. Boards and staff must constantly reassess their goals. The author advocates a scrupulous attention to the maintaining of independence in decision making and in financing. Their goal must remain one of achieving equal justice for the poor.

COURTS 1982

S. E. Nevas, "The case for cameras in the courtroom." (1982) 6 Prov. Judges J. 3:5.

The author is counsel for the media in the U.S. Pooling of equipment makes the presence of the media less intrusive. The hardware is better and quieter. The author canvasses the arguments against the use of T.V. in court and concludes that statistics show there is little effect, some of which may be positive. More research is needed. The requirement of consent for filming in court is an abdication of the judge's authority. Newspapers never have been told to publish all or nothing. Why should the visual media be any less responsible or more restricted? The author concludes that the justice system belongs to all citizens and should be accessible.

ADMINISTRATION OF JUSTICE 1983

ONTARIO

Ontario High Court of Justice, "Observations of the High Court of Justice to a Proposal that it be Merged with the County and District Courts." (1983) 17 Gazette 166.

The author considers the proposal for amalgamation of the High Court and county and district courts of the province, allowing county and district court judges to become full members of the senior court. The Law Reform Commission of Ontario recommended against the proposal. The proposal would produce a unified court split into regional divisions. The author canvasses the arguments presented against the proposal including the unwieldy nature of the result, and concern over the resulting quality of justice as it relates to judicial appointments. He considers the newly formed District Courts as a partial solution and looks at the McRuer Report recommendations. The author concludes with a review of the Law Reform Commissioners recommendations for improvement in court administration without disturbing the existing relationships and with an assertion that the establishment of the District court disposes of the need for the merger.

ADMINISTRATION OF JUSTICE 1986

CANADA

J. A. Osborne, "Delay, contempt of court and the right to legal representation." (1986) 28 Can. J. Crim. 31.

The author deals with the tension between the lawyer's role as representative of his client and officer of the court. Delay causing inconvenience to the court may result in a contempt citation. Efficiency may conflict with an accused's right to counsel. There is considerable pressure on the judiciary to remedy the problems of lengthy delays. The victim can end up being the accused if a remand is refused where the accused is not properly represented. The author deals with the nature of a citation of contempt and its procedure. Mens rea is a critical element in a counsel's failure to appear in court. A citation for contempt may damage a lawyer's career but a client may have his case jeopardized by counsel's failure to appear. Counsel are being put on notice that if they cannot meet their commitments they should hand the case over to someone who can.

ADMINISTRATION OF JUSTICE 1980

ONTARIO

V. Paisley, "Begging to differ; jury trials do not clog the system." (1980) 4 Can. Lawyer 3:10.

The author takes issue with the assertion that a reduction in the number of jury trials allowed and a restriction on the offences for which a jury trial was available, would solve the clogging of the court system. Statistically, a very low percentage of those who have a right to a jury trial at this time take advantage of that right. The problem is not with lawyers unnecessarily "ringing their cash registers and erecting barricades to obstruct justice" but rather with underfunding by the province. The author asserts that the public is satisfied with the current jury trial system and that it is within the power of the province to remedy the overcrowding problem without reducing the rights of the individual facing a criminal charge.

COURTS 1986

NEW ZEALAND

G. Palmer, "The growing irrelevance of the civil courts." (1985)
5 Windsor Ybook Access Justice 327.

The author considers the civil courts and how they provide access to justice, from his perspective as law educator, law reformer, lawyer and parliamentarian. He concludes that, given the welfare system and social programs, the civil courts are of diminished relevance to the average citizen.

ADMINISTRATIVE AGENCIES 1982

ONTARIO

G. Patterson, "Practice and procedure before the Ontario Environmental Appeal Board." (1982) 3 Advocates' Q. 181.

The author considers the statutes under which this tribunal is empowered, appeals to the Environment Appeal Board, appeals from decisions by the Environment Appeal Board, the jurisdiction of the board, the procedure used and the statutes which relate to that procedure, and finally the post-appeal stage in the proceedings.

COURTS 1983

ONTARIO

P. M. Perell, "Civil jurisdiction of Ontario county and district courts." (1983) 4 Advocates' Q. 10.

The purpose of the article is to explore the jurisdiction of the county and district courts as they existed on September 30, 1982, and as established according to the Constitution Act. The author makes the distinction between superior and inferior courts and cites the various acts which dictate their role. The County Court Act establishes the monetary jurisdiction and when a transfer to another court may occur. The author reviews the substantive jurisdiction of county courts, its appellate and territorial jurisdiction. He then considers the relationship of the County Court Act to that of the Judicature Act and the jurisdiction of the court as extended to that dictated by other statutes. County courts have a well established role in reviewing the constitutional validity of legislation. The author considers changes as a result of the Constitution Act, 1982 and in particular the Charter. Will the county court be able to offer section 24 remedies? The author concludes that the civil jurisdiction of the county court is extensive and that issues remain as to its changing jurisdiction.

COSTS 1982

G. Phillips, "Compensation for losses flowing from an injured party's impecuniosity." (1982) 20 Osgoode Hall Law Journal 18.

The landmark, dealing with the issue of damages resulting from an impecunious plaintiff, is the 1933 case of Liesbosch. In that case it was held that damages resulting from the impecuniosity of a dredging company after a collision at sea were too remote to be attributable to the defendants. The author describes the case law before and after the Liesbosch and concludes that there are two separate issues. Does impecuniosity create new heads of damage in cases where the losses suffered are ones which would only be experienced by an impecunious plaintiff? Does impecuniosity create an excuse for the plaintiff's failure to mitigate damages? In the U.K. and New Zealand it has been held that impecuniosity does excuse failure to mitigate. In Canada, although many cases of this nature have been decided, there does not appear to be a clear pattern and the cases are irreconcilable. The author concludes that impecuniosity should excuse failure to mitigate even if such damages were unforeseen.

ADMINISTRATION OF JUSTICE 1983

ONTARIO

R. F. Reid, "The Ontario Divisional Court." (1983) 17 Gazette 71;
(1983) 43 R. du B. 529.

The Divisional Court has had a 10 year trial period in Ontario. The author discusses its role in relation to other Ontario courts, its jurisdiction to hear appeals from tribunals and applications for judicial review or appeals from local judges or masters' decisions. He describes the procedure, the nature of the hearing and the means of appealing a Divisional Court decision to the Court of Appeal with leave. The author considers the success of the court in light of the McRuer Report and concludes that it is a reasonable success in light of its objectives and that it should be improved, not dismantled.

ADMINISTRATIVE PROCEDURE 1978

ONTARIO

W. Riddell, "Procedures before the Ontario Workmen's Compensation Board." (1977) 1 Advocates' Q. 46.

The Workemen's Compensation Board pays benefits to injured Ontario employees and gains its authority under the Workmen's Compensation Act R.S.O. 1970 c.505. It has both administrative and appellate branches. The author describes the process of application for benefits, assessment, claims adjudication and the mode of appeal. The author stresses the informal nature of hearings, the rules of evidence, use of witnesses and affidavits and the lack of need for a lawyer.

ADMINISTRATION OF JUSTICE 1984

CANADA

R. C. B. Risk, "Lawyers, courts and the rise of the regulatory state." (1984) 9 Dalhousie L. J. 31.

The author surveys regulation in the legal system from the late nineteenth century to the present and suggests that the ideals of lawyers have been fundamentally challenged in that time. Two of his primary concerns are the problems of interpretation of statutes and the rule of law. He asserts that these ideals may well have caused much harm and legitimated abuse of power. The problem remains whether such ideals can be reformulated in a regulated society.

ADMINISTRATION OF JUSTICE - 1986

CANADA

J. J. Robinette, "The prospects for justice." [1985] Beyond Orwell 497.

The author "attempts to divine the future by looking at the past." He considers changes in the common law as in Donahue and Stephenson, Hedly Byrne, and High Trees and their impact. He suggests that changes occurred because of significant economic, social and technological changes. The same may be anticipated for the future. Robinette predicts that the rule of stare decisis will be lenient in the future, that there will be leniency in Charter cases. He considers the independence of the judiciary and the importance of the selection of judges.

PUBLIC LEGAL SERVICE 1978

CANADA

P. Rosen, "Legal service delivery - a practitioner's view."
(1977) 1 Can. Com.L. J. 18.

Philip Rosen is a lawyer who was involved in legal aid for five years. The article is based upon an address presented by the author at a workshop for the Canadian Council on Social Development on universal access to professional services. The author lists the basic barriers to universal access to legal services; lack of information, insufficient economic resources, geographic disparity in distribution of personnel, and social barriers. He goes on to describes various methods of overcoming the above barriers including legal aid programs and use of the media.

PUBLIC LEGAL SERVICE 1979

ONTARIO

H. Savage, "Ontario's community clinics provide law for the little guy." (1979) 3 Can. Legal Aid Bul. 685.

Legal aid clinics fill a gap created by the Ontario Legal Aid Plan. The Plan provides for an individual to be represented by a lawyer of his choice who, in turn bills the Ontario Legal Aid Plan. However, large areas of representation do not qualify for legal aid and there is a lack of consistency in the application of loose criteria. Clinics attempted to remedy the problem of restricted access to legal services. Numbers of clinics and funding has increased. So has the complexity of the law for the lay person. Many groups of low income people still go unrepresented. The author recommends expansion of clinics, education, and recognition of paralegals and clinic workers.

ADMINISTRATION OF JUSTICE 1983

ONTARIO

I. Scott, "Practical problems in the Ontario divisional court."
(1983) 43 R. du B. 559.

Scott discusses the problems for counsel in the Ontario Divisional court resulting from applications for judicial review. The Judicial Review Procedure Act determines when a matter is sufficiently urgent for immediate consideration. The author establishes some proposed criteria for defining an urgent matter. He also considers the appropriate use of the act for stays, the appropriate procedure for interlocutory proceedings, supplementing the tribunal record, and the court's statutory scope of judicial review. He considers the Divisional court as an expert tribunal and the use of Charter in judicial review. In discussing the standard and scope of judicial review, the author concludes that natural justice and fairness are substantive as well as procedural standards. Any changes will have wide ramifications.

ADMINISTRATION OF JUSTICE 1979

S. Shetreet, "The administration of justice: practical problems, value conflicts and changing concepts." (1979) 13 U.B.C. L. Rev. 52.

Pressure for reform of the machinery of justice must not jeopardize or compromise the quality of justice provided or the underlying traditional values it represents. The problem of delay is centuries old. However, the values remain the same. They involve judicial independence, public confidence in the court system, accessibility, quality and efficiency. The purpose of the courts is to mete out justice and settle disputes. This requires the independence of the judicial process and minimal executive control. Public confidence in the process will be enhanced by an improvement in the social and economic range of appointed judges to provide greater representation. The need for long term reform to achieve these goals must not be at the expense of traditional values. The author raises the restriction on civil jury trials and plea bargaining as questionable examples of increased efficiency at a cost. Some of the present lack of efficiency can be remedied by proper classification of disputes and their allocation to the correct court preventing expensive trials for trivial disputes. Some reforms made to provide greater efficiency will prejudice the people and the author recommends a cautious approach.

COURTS 1980

S. Shetreet, "On assessing the role of courts in society." (1980)
10 Man. L. J. 355.

The author looks at the courts as an important social institution and not merely a forum for dispute resolution. The role of the courts depends on the expectations of the public and the judges' perception of their function. The author establishes a criteria for assessing the judicial role in society. His focus is the English judiciary. He considers the increased public criticism of the judges and concern over the tension between liberalism and conservatism in decisions and reasons. There is a concern also with the make up of the judiciary in social background terms. Are they sufficiently representative? This societal composition has an impact on the nature of decisions made in general. He considers the patterns and standards of judicial conduct and their relevance to decision making. The author considers the tension between public accountability and judicial independence and expresses a concern over the potential "chilling effect" of public scrutiny of judges and courts. He concludes that the courts are moving away from conservatism and recommends that the judiciary must be fully representative of the public in order to retain their confidence.

ADMINISTRATION OF JUSTICE 1979

CANADA

S. Shetreet, "Time standards for justice." (1979) 5 Dalhousie L. J. 729.

There need to be standards to provide for expeditious justice. The author distinguishes expeditious justice from speedy justice. There is a problem in measuring delay in order to determine whether it is prejudicial. The starting point varies from the event which resulted in litigation to the date of judgement. Delay may be caused by court officials or counsel. That responsibility for delay may determine the starting point in calculation of delay. The author advocates a numerical standard to measure unacceptable delay. He distinguishes normal from extraordinary time. The Criminal Code contains prescribed time limits. Other jurisdictions also have rules of practice to act as guidelines. There are a number of sanctions available to enforce time limits. The author concludes by suggesting that conflicting variables must be considered in determining a yard stick for expeditious justice, and that speed is only one of those factors.

ADMINISTRATION OF JUSTICE 1980

CANADA

M. C. Shumiatcher, "The Supreme Court and the oral tradition."
(1980) 1 Supreme Court L. R. 479.

The concern of the author is with the proliferation of verbose paperwork produced by the courts. The author offers statistics on the Supreme Court Reports and their growth. The output of paper before the courts is also an issue, causing delays and considerable overwork by the judges. Long and tedious factums petrify the creative process and argument presented at the appeal level. The author recommends the Privy Council method of presentation of cases and written argument. This allows for more flexibility in oral argument, for a better distillation of the written argument and the law, and for equally short inciteful responses from judges. An increase in physical resources is not the solution.

ADMINISTRATION AGENCIES 1982

ONTARIO

B. E. Smith, "Practice and procedures before the Environmental Assessment Board." (1982) 3 Advocates' Q. 195.

The author reviewed the current system which requires public hearings to be held. He considered the draft report and the procedure required including the parties, the necessary assessment, the consideration of the Minister and the Lieutenant Governor and the necessity for a decision with reasons. Written reasons, the informal use of "participants" and witness statements add to public confidence and acceptance of the process. The Consolidated Hearings Act of 1981 avoids repetition and duplication of hearings.

ADMINISTRATION OF JUSTICE 1980

ALBERTA

S. B. Smith, "The superior courts of Alberta." (1980) 25th Anniversary issue Alberta L. Rev. 8.

The author looks at the Appellate Division, the Trial Division of the Supreme Court of Alberta and the Supreme Court of the Northwest Territories and he recalls the memorable judges within his recollection or knowledge since his articles in 1918.

ADMINISTRATION OF JUSTICE 1987

R. J. Sommers and S. E. Firestone, "In Defence of the civil jury in personal injury actions." (1987) 7 Advocates' Q. 492.

The issue is whether civil juries should be retained. It is argued that there are benefits to the prosecution, defence, the community and the legal system as a whole. The prosecution and defence benefit when there is greater acceptance of a decision based on the judgment of 6 peers. The defence is less likely to appeal and there is greater likelihood of settlement. The process is demystified for the community. The legal system benefits when there is an encouragement for counsel to be better prepared. The conclusion is that in any balance, the benefits outweigh the problems.

COURTS 1983

CANADA

M. F. Southin, "Reflections on chaos in the courts." (1983) 41 Advocate 641.

The author contends that responsibility for the chaos in the courts lies not only with the Bar but with the Legislature and the Parliament of Canada, judges and society as a whole. The difficulties arise from too many, too long lawsuits. She considers, in particular, the negative impact of the Family Relations Act, The Income Tax Act, and The Judicial Review Act, all of which helped to expand the base of litigation without contributing to clarity. Judges, on the other hand, have taken on the role more properly that of the legislatures. The author recommends judicial restraint in order to prevent a flood of new causes of actions. Judges should not be law reformers. Similarly, lawyers, in their attempts to have a "profound effect" increase the caseload of the courts. The author criticizes the competence of the judiciary and cites occasions where she has had to explain first principles to a judge. She concludes by admitting that lawyers are responsible for increased litigation but only at the initiation of it which is their appropriate role.

ADMINISTRATION OF JUSTICE 1979

ALBERTA

R. B. Spevakow, "Small claims for Alberta: some recommendations."
(1979) 17 Alberta L. Rev. 244.

The author deals with the purpose and problems of Small Claims Courts in Alberta. Is accessibility lost when small claims courts become collection agencies. He expresses concern that the individual is ignored and that the process is plaintiff oriented. He recommends that the defence have more help, time limits be set, collection agencies barred and that default judgments be made less easy. The "discovery" system makes the court less accessible to the lay man. The monetary limit for small claims should remain as it is. Personal injury claims for general damages should be barred. Appeals should be limited. Rules of evidence should remain flexible. He advocates maintaining the adversarial system at this level and choosing to appoint motivated judges. Lawyer participation should be limited. Judges must become more active. He recommends revisions by way of committees of judges and lawyers and clerks.

PUBLIC INTEREST 1981

J. Swaigen, "Clients v. causes." (1981) 5 Can. Lawyer 3:21.

Swaigen offers a defence of public interest law. It represents unpopular but important causes. Its need is reflected in the growth of civil rights and poverty law. There is a tension between private dispute settlement systems and public rights. A redefining of roles is necessary. The author asserts that lawyers involved in such a system are no longer the "value free professional for hire" and that the legal system is no longer the preserve of private interests.

PUBLEC LEGAL SERVICE 1982

SASKATCHEWAN

T. H. Taylor, "Paralegals in Saskatchewan community legal services clinics." (1981) 4 Can. Legal Aid Bul. 73.

The purpose of the study was to find out about the role of paralegals in 13 provincial clinics. There is a wide continuum of qualifications and activities of paralegals. The study was done by survey and interviews and resulted in statistics in what exactly paralegals do. It was concluded that there is a very wide range of training and that training should include "insight" training. The author makes a number of specific recommendations regarding paralegal training, and notes that improvements have begun in Saskatchewan already.

ADMINISTRATION OF JUSTICE 1983

ONTARIO

M. Teplitsky and W. Low, "Arbitration - an alternative." (1983) 4 Advocates' Q. 233.

The author addresses the need for arbitration to settle disputes at the supreme and county court levels in Ontario in order to avoid unnecessary hurdles for litigants. The pre-trial motions and other procedures, while necessary, are often excessive and used to create leverage for one of the litigants. Costs, delays and the presence of some inadequate judges contribute to a failure to achieve justice. The arbitration process would alleviate these problems and contains no mandatory pre-hearing procedures. It is less formal and formidable although involving the taking of oath for giving of evidence. The time for reserved decisions can be measured in weeks, not months or years. Costs for an arbitrator are substantially lower than those required for court appearances. The author concludes that such a system would be speedier, less expensive and help resolve some of the problems the courts are facing currently.

PUBLIC LEGAL SERVICE 1981

GREAT BRITAIN

P. A. Thomas, "The Royal Commission on Legal Services in England and Wales." (1981) 1 Windsor Yearbook Access Justice 179.

The author considers the nature and scope of hearings before the Royal Commission and their limited scope. Pressure groups such as the Law Society came before the Commission and presented glowing evaluations of lawyers as a group. The purpose of the Commission was to consider in an innovative way, reform. The issues raised included delays, community legal clinics, arbitration and reform in general. The author concludes that the Commission's work was limited by narrow thinking and an attempt to please everyone, and was a waste of time.

COURTS 1983

ONTARIO

J. Thompson, "Applications and summary applications to the county court - some recent developments." (1983) 4 Advocates' Q. 106.

The issue raised is whether summary applications must be brought by action commenced by writ of summons rather than by an originating notice in County Court. The author follows the parallel progress of the Civobel case and the Durham case, which produced inconsistent results in the Ontario Court of Appeal. The Supreme Court of Canada decision resolved the issue in favour of a requirement that applications must be brought by way of action commenced by writ of summons unless a statute expressly allows otherwise. The author adds that this applies even for summary applications.

PUBLIC INTEREST 1981

M. J. Trebilcock and K. Engelhart, "A tax credit for public interest groups." (1981) 3 Can. Taxation 29.

The issue is underrepresentation of groups representing certain interest groups. There must be an alternative means of financing such groups. The author concludes that there should be a tax credit for those who contribute to public interest groups. Failure to fund them creates inequalities in the legal system.

ADMINISTRATION OF JUSTICE 1985

H. Turkstra, "Strictly personal views on the system: cultural conflicts in the courtroom." (1985) 4 Advocates' Soc. J. 1:7.

The author considers cultural conflicts in the courtroom where lawyers are dressed like priests. Church and state may not be as separate as one thinks. There is unnecessary formality and separation of judge and counsel which is not in tune with today. The legal system functions in a dead language and concepts, with linear rather than lateral thinking. The author considers the possibility of privatizing the system, other than the criminal courts. Disputes would have to be settled by common sense.

ADMINISTRATION OF JUSTICE 1979

BRITISH COLUMBIA

G. Turriff, "Some thoughts about a Commercial List for British Columbia." (1979) 37 Advocate 225.

In 1895 in Britain, a commercial list was established to provide for the disposal of commercial actions away from the Queen's Bench work. This was to remedy the complicated and not altogether appropriate procedure previously required of litigants in commercial disputes. The author defines the type of "commercial cause" to which such a system would apply and considers whether it would make a difference in Canada in terms of efficiency. Time and overly complicated procedures would be saved. Currently in B.C. there is much of the mechanism already in place. The appointment of a judge with special experience in commercial cases to take control of the commercial list is all that remains to accomplish. Where arbitration is appropriate it should be used. Where it is not, an expedient and uncomplicated specialized procedure should be available.

ADMINISTRATION OF JUSTICE 1983

BRITISH COLUMBIA

J. and L. Waterhouse, "Implementing unified family courts: the British Columbian experience." (1983) 4 Can. J. Fam. L. 153.

The author provides a summary of events leading to the 1974 British Columbia project on unified family courts. The concern was the viability of a non-adversarial approach to family disputes. The program was developed by the N.D.P. in 1972 as a response to a situation of fragmentation of jurisdiction. A commission was established and a pilot project set up. Supreme and Provincial courts and judges were put under one roof and enabling legislation passed. A Family Counsellor provided conciliation services and custody investigations. The Unified Family Court Act was for enforcement of agreements entered into on a no-fault basis. The Family Advocate protected the interests of the child. The response to the project was largely positive. It was concluded that the lower court was the proper place for a unified family court and that both the Advocates and Counsellors should be retained. The system was not fully realized and faded with the change of government.

ADMINISTRATION OF JUSTICE 1979

CANADA

G. D. Watson, "Civil pretrial procedure and expeditious justice."
[1979] Exped. Justice 125.

The pre-trial stage in a civil proceeding can be sufficiently long as to defeat the purpose of providing expeditious justice. It involves lengthy preparation and waiting for an available court and judge. However the purpose of a pre-trial is often met when it results in settlement without going to trial or complete readiness on going to trial. The author provides an overview of the procedures and the potential ways in which such procedures may result in a disposition without trial. It is, however, expensive, long and there is not sufficient pre-trial disclosure. This is contrary to the objectives of civil procedure to provide just, speedy, inexpensive resolution. The author suggests a number of reform strategies including greater simplification and increased pre-trial discovery. He goes further to suggest radical reform including abandoning affidavits and relying on statements. There is a discussion of caseload management and delays caused by the court and by lawyers. Pre-trial conferences and other similar methods would encourage more settlements.. He concludes by stating that the purpose of reform must be to reduce delay, simplify procedure, and increase control over pre-trial progress of a case. However, making trials speedier may act as a detriment by encouraging people to litigate more, according to a speedier procedure than conciliation.

ADMINISTRATION OF JUSTICE 1986

G. Watson, "Decision Making" [1985] Beyond Orwell 467.

The author considers the two phenomena in civil litigation which have evolved in the 1970's and 80's, alternate dispute resolution and managerial judges. The first involves techniques such as mediation, conciliation, negotiation and arbitration, and the creation of "justice centres". The second involves a change in the role of the judge from that of disinterested adjudicators to a managerial stance. The author questions what either method has to do with access to justice.

ADMINISTRATION OF JUSTICE 1985

N. Weisman, "On Unified family courts." (1985) 42 Rep. Fam. L. (2d) 270.

The focus of the article is on the need for unified family courts. The problem of two different courts, provincial and federal, empowered to deal with the same issue simultaneously, is discussed. The author cites a number of cases which demonstrate the difficulties and inequities created by such a system. Where there is a unified family court the people needn't be shunted back and forth between courts and delay would be minimized. The author concludes that the present system is archaic, inefficient, costly and doesn't meet the needs of the parties that come before it. There needs to be a unified system with one court in each province given exclusive jurisdiction over family law matters.

PUBLIC LEGAL SERVICE 1981

ONTARIO

F. H. Zemans, "Community legal clinics in Ontario, 1980; a data survey." (1981) 1 Windsor Yearb. Access Justice 230.

Professor Zemans used a questionnaire to get information on community based clinics funded by the Ontario Legal Aid Plan. He provides a brief history of legal aid in Ontario from 1951 under the judicare system with volunteer participation of private lawyers on a fee-for-service basis in order to provide legal assistance to the poor. The author provides a comparison of English neighbourhood law centres and the Ontario community legal clinics including source of funding and pay scales. The questionnaire he used was a refinement of an earlier one. A summary of the data shows that in Ontario clinics there are two times as many paralegals as lawyers. Few conclusions can be drawn from the data although it provides a summary of financial criteria, geographical criteria, ethnicity, means by which the public knows about a clinic, services for individuals rather than groups, lack of reform work, any specialization, and the diversity of other services provided. The article concludes with tables of data from all the clinics and an appendix list of all clinics.

PUBLIC LEGAL SERVICES 1979

CANADA

F. H. Zemans, "Legal aid and legal advice in Canada; an overview of the last decade in Quebec, Saskatchewan and Ontario. (1979) 3 Can. Legal Aid Bul. 155.

The author looks at legal aid developments in the past 10 years in parts of Canada, and experiments which have taken place.

There has been considerable budgetary growth, particularly in Ontario where the need has been recognized and community clinics set up. These clinics service the poor, whose situation has not improved. There remains a tension between advocates of the judicare system and those of the neighbourhood legal services. The provinces remain distinct, however, in their mode of delivery. In Quebec, the community legal clinics seem to be in jeopardy. The resulting system is a compromise between the judicare and staff models. The approach has been case by case and has not in fact addressed the root causes of poverty as it had intended. Saskatchewan had a voluntary system which was largely unsatisfactory. Subsequently clinics were set up. There is an independent Commission set up to administer the whole program. Public education is a large focus and financial eligibility is quite flexible. Ontario followed the British model. The Ontario Legal Aid Plan was set up by the Law Society in 1951. It covers most civil cases and indictable criminal cases. It also began as a largely voluntary plan. It remains served by a private Bar and a fee-for-service model. In general, budgetting is low and the need remains high.

PUBLIC LEGAL SERVICE 1982

ONTARIO

F. H. Zemans, "The public sector paralegal in Ontario: community legal worker." (1981) 4 Can. Legal Aid Bul. 130.

Paralegals have a specific role to play. They are less expensive and are often from the community they serve. The demand for legal services exceeds the available capacity. A monopoly by lawyers does not create an access to justice. The stringent admission requirements to the practice of law are restrictive. The issue is, what can paralegals do to relieve the situation? The author distinguishes between public service paralegal and private in terms of funding and cliental. The author describes the American experience with "storefront" lawyers, and the Ontario experience under the Ontario Legal Aid plan. In 1971 neighbourhood legal services clinics such as Parkdale were created using paralegals. The mixed system of lawyers and paralegals appears to be the most successful at the moment with a considerable increase in the use of paralegals in clinics and community legal offices.

PUBLIC LEGAL SERVICE - 1986

F. H. Zemans, "Recent trends in the organization of legal services." (1985) 11 Queen's L. J. 26.

The author provides a world over-view of the development in provision of legal services to low income persons since 1977. He traces the development along market principles. The fundamental principles on which legal services should be provided were related to the moral merit of the issue. He considers various models of delivery, distinguishing between service and strategic schemes, and the judicare versus the community legal services clinics. The author concludes that access to justice or quality of justice are still subordinate to the cost of justice in the 80's. There is little hope for the poor who need legal services. The author concludes with an appendix containing the questions asked national reporters for the different countries in this survey.

ADMINISTRATION OF JUSTICE - 1987

CANADA

J. S. Ziegel, "The Supreme Court of Canada and private law appeals; editorial." (1987) 12 Can. Bus. L. J. 385.

60% of Supreme Court cases are Charter appeals, creating a backlog. One of the consequences is a failure on the part of the Supreme Court to act as a unifying force. Provincial courts will become courts of final decision, creating uncertainty from province to province. The author recommends that there be a reduction in the number of criminal appeals to the Supreme court and the number of Charter cases. The court should hear only important basic doctrinal and policy issues.

ADMINISTRATIVE AGENCIES 1980

G. J. Zimmerman, "Synergy and the science court: scientific method and the adversarial system in technology assessment." (1980) 38 U. T. Fac. L. Rev. 170.

The author considers the creation of a "Science Court" to provide an unbiased account of scientific data on questions in an adversarial setting. This court would deal with scientific issues such as the use of nuclear power. The court would be composed of scientists who would make recommendations rather than issuing a verdict. It would exist on an ad hoc basis although some judges would be permanent. The system would allow for experimentally verifiable scientific questions to be isolated from political considerations. The author concludes that the court could consider both "soft" and "hard" facts in making its assessment and balancing values. The value of such a system would include the use of both the dialectic method of law and the empirical method of science. The author cites challenges or problems related to such a court in terms of its appropriateness, its scope and its mixing of scientific and societal values. He concludes that a science court would fine tune the decision making process in technological matters, not create policy answers.

ADMINISTRATION OF JUSTICE 1986

ONTARIO

M. Zuker, "Small claims courts." [1986] 4 Just Cause 2:15.

The author questions whether, despite reforms, the Small Claims courts have become any more accessible to the people they are intended to serve. They are speedy and inexpensive but access involves knowing when your rights exist and have been violated and how to deal with them. This must be as essential an element as speed.

PUBLIC LEGAL SERVICE 1977

CANADA

"Alternative organizational models for the delivery of legal services; a panel discussion." (1977) Law and the Poor 71.

The article consists of a transcript of a panel discussion dealing with legal access for the poor. The panelists are confused and in disagreement about the focus of the discussion which ranges from the general issue of poverty, legal services for the poor, and lawyers complicity or participation in the problem and solution. No consensus is reached even on the nature of the issue being discussed.

PUBLIC LEGAL SERVICE 1985 - CANADA

"Legal aid in Canada" (1985) 2 Justice Reports 3:14.

All provinces now have legal aid systems and funding agreements with the federal government. All citizens have an equal right to legal aid. Current caseloads stand at 18 requests per 1000 population. 46% of those are criminal cases. The cost of the service is \$178.6 million in 1983-84.

PUBLIC LEGAL SERVICE 1982

CANADA

"Legal aid in Canada. L'aide juridique au Canada." (1981) 4 Can. Legal Aid Bul. 318.

The right to legal aid is based upon the principles in international documents on human rights and the right to legal representation. Since 1972 there have been federal/provincial cost sharing agreements in criminal cases. There is a flexible test of need. The author assesses the administration and delivery systems available. Most are run independent of the government. Only P.E.I. has a government run system. There are three models; the judicare model with private practice lawyers billing legal aid, a mixed system with both private lawyers and community legal centres, and a salaried staff model. The author concludes that the system must be enhanced and extended. There is a lack of uniformity across Canada and no national policy.

"Meeting the needs; legal aid plans and the disabled; report."
(1983) 1 Just Cause 3:19.

C.L.A.I.R. is the Canadian Legal Advocacy, Information and Research Association for the disabled. Do legal aid services meet legal needs of the disabled? C.L.A.I.R. sent a questionnaire out in 1982 to determine the answer. The purpose of legal aid is equal protection under the law. The disabled are generally poor. The article dealt with the issues of the legal aid framework, specific services to the disabled and the need for research, education and liason. The results of the survey suggested that although willing, the system is not serving the disabled yet. There is a need for more government funding, pro-active clinics, education in the profession about the disabled and similar education within institutions. Clinics are the best set up and should be made physically accessible. Interpreters must be available and research facilities set up.

ADMINISTRATION OF JUSTICE 1984

CANADA

"The press, the bench and the bar; a symposium." (1984) 8 Prov. Judges J. 3:14.

The article surveys the viewpoints of 4 participants in the Newfoundland conference on "Publicity: The end of Justice". Mr. Justice John Mahoney is not opposed to non-intrusive cameras in the courtroom but does not see the value in judges being interviewed by the media. Mr. Sean Finley of the St. John's Evening Telegram concludes that the issue should not be whether the media should be present in the courtroom but the groundrules under which they may operate. The Charter should guarantee the freedom of the press and the media must satisfy its responsibilities to the public. Ms. Kathryn Wright of the C.B.C. addresses the argument of potential distortion by editing of media tapes. She suggests that simple guidelines will ensure that cameras do not become intrusive or create grandstanding. Finally she exhorts judges to be more forthcoming to the press, more accountable. Mr. David Day Q.C. of St. John's concerns himself with whether a videotaped trial prevents or assists the accused in obtaining a fair public hearing. Mr. Day concludes that in certain circumstances a public hearing may not be a fair hearing given the nature of the subject at issue. Too much is at the discretion of the media in its choice of trials and its editing of proceedings.

ADMINISTRATION OF JUSTICE 1984

CANADA

"Publicity: the soul of justice. La publicite: l'ame de la justice." (1984) 8 Prov. Judges J. 2:5.

The article discusses the Canadian experiment regarding cameras in the courtroom. The author considers the arguments in favour of the presence of television in the courtroom in light of the opinions of Dan Henry, on behalf of the Radio Television News Directors Association of Canada. Is it necessary to have direct, uninterpreted information and education on what occurs in our courts? Will cameras disrupt or enhance performance in court? The author tries to balance the public's right to information against efforts at sensationalism and infringement of the rights of participants. Freedom of the press requires discretion in the use of videotapes made in courtrooms and the media will bear the consequences for repercussions.

ADMINISTRATION OF JUSTICE 1978

ONTARIO

"Reports on the administration of justice in Ontario on the Opening of the courts for 1978." (1978) 12 Gazette 48.

Chief Justice Howland, in conjunction with other Chief Justices of the province provide a statement of account to the public, of the workings of the Ontario courts, for the first time. Justice Howland sees congestion of the courts as the prime problem. The Ontario Courts Advisory Council is being convened to assess and improve the administration of justice in Ontario. The author offers a summary of the work of the Court of Appeal in 1978. Chief Justice Evans does the same for the High Court and Chief Justice Colter assesses the County and District Courts. His Honour H. A. Rice, on behalf of Chief Justice Hayes, summarizes the work of the Provincial Court Criminal Division and Judge Andrews does the same for the Provincial Court Family Division.

ADMINISTRATION OF JUSTICE 1979

CANADA

"Reports on the administration of justice in Ontario on the Opening of the courts for 1979." (1979) 13 Gazette 3.

Chief Justice Howland reports on the 3 levels of courts in Ontario and observes an increase in the recognition of the need for the various levels to work together. Caseloads have increased while funding has not kept pace. It is necessary to become more cost-efficient. However the value of the legal system is not represented by the percentage of the provincial budget allocated to its management. There has been a reduction in case backlog due to the cooperation of the bar, and better control over the judicial process. The Bench and Bar Committee and the Ontario Courts Advisory Council have been formed to deal with problems of administration of justice. Many of their recommendations with regard to monetary jurisdiction and increased disclosure are being implemented. One of the chief problems has been delays caused by adjournments. Justice Howlands exhorts the defence counsels and crowns to cooperate to reduce delays. Justices Evans, Colter, Hayes and Andrews summarized the year's work for the High Court, County and District Courts, Provincial Court (Criminal Division) and Provincial Court (Family Division) respectively. All cite an increased caseload. The Unified Family Court experiment has been well received. It is recommended that the County Courts become more centralized.

ADMINISTRATION OF JUSTICE 1980

ONTARIO

"Reports on the administration of justice in Ontario on the opening of the courts for 1980." (1980) 14 Gazette 113.

Chief Justice Howland offers a summary of the activities of the Ontario courts in 1979. He stresses the importance of democratic principles in our system. The case load has substantially increased and a number of legislative changes have occurred. The Newmarket courthouse is finally open. Justice Howland describes the matters which have been considered by the Bench and Bar Committee in the past year. He also summarizes the workings of the Court Appeal. Chief Justice Evans presents his third annual report on behalf of the High Court of Justice. Justice Colter does the same for the County and District courts, Justice Hayes for the Provincial Court Criminal Division, and Justice Andrews for the Provincial Court Family Division.

ADMINISTRATION OF JUSTICE 1981

ONTARIO

"Reports on the administration of justice in Ontario on the Opening of the courts for 1981." (1981) 15 Gazette 26.

This was the fourth year of reporting. Chief Justice Howland cited a need for a strong, independent judiciary and observed that budgets are not keeping pace with need. He described new courthouse plans in the province, an increasing caseload which is just under control and provided statistics on the work of the Provincial courts, the County and District courts, the Supreme Court and the Court of Appeal. He discussed the use of preliminary hearings, committees, and the use of arbitration. He considered the need for bilingual courts, more courtroom space and the use of T.V. and the media in the courtroom.

Chief Justice Evans reviewed the work of the High Court. Justice Colter reviewed the County and District courts including recent legislative changes, and experiments such as the Unified Family Courts. Justice Hayes described the year for the Provincial Court criminal division and Justice Andrews did the same for the Family Division. In all instances the workload was on the increase and staff and space were at a premium.

APPENDIX II

INDEX TO CANADIAN LEGAL PERIODICAL LITERATURE

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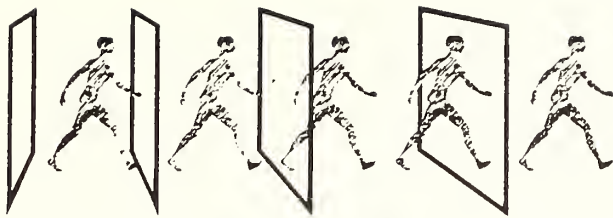
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ACCESSIBILITY, EFFICIENCY AND EFFECTIVENESS:
CONFLICTING OBJECTIVES OF CIVIL PROCEDURE IN
THE GERMAN EXPERIENCE

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1. INTRODUCTION

When establishing an increase in the demand on justice in general and civil justice specifically, we have to ask what we mean by demand: is it an increase in the number of cases brought before the law courts, or have the cases become more difficult than they used to be, or does the public just keep a sharper eye on those providing for and acting within the judicial system? Maybe a bit of everything.

The juridical system in any given society is inseparably connected with the concept of that society. As long as we had the corporate state in Europe, there was no idea of access to justice being a problem: every societal stratum had its own jurisdiction (cf. Krause 1930:15-29). It was the philosophy of the enlightenment, in the 18th century, that brought forth the idea of equality, and only in the 19th century did the socio-economic situation in most countries force those in power to reform the law under egalitarian aspects. These were the times when the law was rationalized, and its universal character discovered¹ - with the consequence that the law courts were now to provide justice for all citizens (cf. Friedman 1978:10-12), although this turned out to be up till now an only ideal. Nevertheless, the concept of the state, and

consequently that of the law, was further developed from a liberal one toward a social one, namely that of the welfare state, in the 20th century. Legal theorists have described this process as the substantive rationalization of law, subsequent to the formal rationalization during the past century.² And if we subscribe to this description and ask what that means for the demand on justice, of course we have to report an increase: it is more difficult, and requires more care, to process and adjudicate according to criteria which are just in substance instead of just regarding only formality.

However, there was, and is, always a gap between the ideal of the concept and reality. It has no effect if no one complains about such a gap. But usually it evokes criticism from someone at least, and critique provokes changes if the adherents to the concept do not want it to be proved wrong and, through this, turn out to be merely ideological. But, on the other hand, it cannot be excluded that sometimes the critique itself is fed by ideology, and that the reality is more consistent with the goals than asserted. In order to get this straight, it helps to investigate in the facts and to uncover the assumptions on the basis of which the critique is applied. This means, in relation to our subject of civil justice, that the reproach that it is "remote, delayed and

expensive" has to be carefully examined before we propose and make any major change.

In the following, I will first give an account of the German experience, in order to have some examples at hand for the discussion of how court critique, changes in the civil justice system (whether or not they earn the term "reform"), and interests by those involved in the system, are interrelated.

2. THE GERMAN EXPERIENCE

Although the main reason why I take as my example the German experience in court and civil procedure reform is that I come from West Germany and hence its situation is the one I am most familiar with, I feel that I nevertheless should further justify this, especially since I am going to draw conclusions from a legal culture based on continental law for an audience living under a common-law tradition. And it is very difficult if not impossible to transfer ideas from one legal culture to another one (cf. Friedman 1978:28-33). However, I do not want to make recommendations based on the German way of dealing with civil justice problems. I just want to deal with the problems related to the demand on civil justice, and for this purpose any country may serve as well as background as any other one. Moreover, it may be interesting to see how a legal

culture with such different roots deals with problems that are linked not only to the legal framework but perhaps even more to a socio-economic situation which is most likely quite similar in western countries. Another reason may be seen from the fact that in West Germany itself an import can be observed, namely that of the U.S. American idea of what has become well-known as ADR, i.e., alternative dispute resolution (cf. Blankenburg et al. 1982). Finally, the sociology of law which supplies many insights into civil justice, is fairly well developed in West Germany (cf. Roth 1983:286).

In this chapter, I will first give a brief account on the organization of the West German judicial system, the main principles of civil justice, and the legal and factual framework of civil procedure (2.1). Thereafter I shall specify what has been, and is, criticized, which reforms have been triggered by the critique, and what else could and can be observed in the context (2.2). I will close the chapter with a summary considering the remaining problems (2.3), by which I can open the discussion in chapter 3.

2.1 Outline of How the System Operates

It is the Constitution (the Basic Law of 1949) that provides not only for law courts but also

for some fundamental principles: adjudication is reserved to judges; judges are independent of the other branches of state power and submitted only to the law; every citizen may seek redress in courts of law³; no judgment may be rendered without having heard both sides to a dispute.⁴ The judicial power is exercised, according to the Basic Law, by the Federal Constitutional Court (*Bundesverfassungsgericht*), and the federal and the state courts. There are five types of jurisdiction: the so-called ordinary (comprising civil and criminal), labor, social-security, administrative and tax-case jurisdictions.

The court system as well as the procedures are regulated more in detail by a number of laws⁵ complemented by judgments on these laws and, for lawyer ethics, the respective (self-)regulations of the German bar association (*Bundesrechtsanwaltskammer*). Most of the laws are more than a hundred years old,⁶ but have been amended several times. Although West Germany is a federal state, there is only one court system. Organization and administration of the courts of original jurisdiction and the appellate courts is given to the states (*Länder*), but each jurisdiction ends up in federal courts.

Yet there are two ways of proceeding in civil disputes. One files a complaint either at a county

court (*Amtsgericht*) or at a district court (*Landgericht*). The difference in the jurisdiction is that the county court functions as a sort of small claims court if the complaint is about a monetary claim.⁷ Besides, the county court has exclusive jurisdiction for landlord/tenant disputes and for family matters. One difference between these two types of courts is to be seen in the number of judges sitting on the cases: the county court decides by a single judge while the district court's decision-making body is regularly a three-judge panel, called chamber (as to the exceptions, see below). Another difference is that proceedings at a county court do not require the parties to be represented by a lawyer, whereas this is required at the district courts. The most important difference, however, is the way of appeal. There is, above the county court, only one appellate court (the district court), whereas beginning a lawsuit at the district court opens the way to two stages of appeal: to the high courts (*Oberlandesgerichte*) which try the cases *de novo*, and finally to the federal court (*Bundesgerichtshof*) which reviews the high court decisions regarding the application of the procedural as well as of the substantive laws.⁸ The high courts decide by panels (called senates) of three judges, the federal court does by panels (also called senates) of five judges.⁹

German civil procedure¹⁰ is now guided by three maxims: the orality principle, meaning that no court decision should be rendered without a hearing; the immediacy principle, providing that the evidence should be taken by the judge(s) ultimately deciding the case; and the principle of concentration, aiming at a single main hearing. But these are only objectives. A suit can be decided without a hearing if the parties agree, or if the case is already "ripe for decision" prior to the hearing (e.g., if the plaintiff does not offer evidence as to the contested facts). Moreover, written statements still serve as the main basis for any decision. The immediacy maxim is not observed if the evidence is taken by a single judge of a district court commissioned with that task and the judgment rendered by the complete panel, as may happen under specific circumstances. The principle of concentration is still less observed than it was intended by the 1976 reform because it needs careful preparation by both the litigants and the court, and most German judges are still used to adjournment of the hearing, as was the factual rule prior to the 1976 reform (cf. Bender 1979).

Originally, the code of civil procedure was fully party-oriented. No decision could be rendered without a party having moved for it; no facts were considered which the parties had not presented to the

court; no evidence taken without either party having offered it. However, during its operation over the past hundred years, the procedure became more and more judge-centered.¹¹ The court sets deadlines right from the beginning,¹² and orders the litigants to amend their pleadings as to the points seeming necessary for a decision in the substance of the case. The judge (or, the presiding judge when the court acts through a panel) leads the process at the hearing. At the beginning of a hearing, the subject matter of the case has to be discussed with the parties to see if the suit can be settled.¹³ If the parties are not ready for settlement, the process goes on. However, the parties in German civil procedure do not present their case as they do at an Anglo-American trial, but only refer to their preparatory written statements. If evidence is taken, again, it is not presented by the parties, but the court orders evidence previously offered by the parties. Witnesses are first and primarily interviewed by the judge, who then gives the parties the opportunity to ask additional questions.

A civil lawsuit can be terminated by several means. Adjudication by a final judgment is the "normal" mode, but not the most frequent one.¹⁴ Then there is of course the possibility of default judgment. If the defendant acknowledges the complaint at once, an acknowledgement judgment, and if the plaintiff waives

her or his complaint, a waiver judgment is rendered. Withdrawal of the complaint is admitted only prior to the hearing, or if the defendant agrees. In this case, no judgment is rendered, but just a court order as to the distribution of the proceeding costs; this is necessary because of the loser-pays principle (cf. *infra*). The same applies, if both litigants declare that the suit has been settled.

The West German civil litigation costs are completely regulated by statutes, both the court fees and the lawyer fees. The fees are computed on the basis of the value at stake. For non-monetary claims, there are rules about how to express their value in monetary terms.¹⁵ The actual fees depend on how far the suit was processed. The statutes contain lists of the basic fees (with the court fees being smaller than the lawyers fees). One court fee is due with filing the complaint. This is doubled when a judgment without (and tripled when a judgment with) a written opinion is rendered.¹⁶ Attorneys-at-law get one basic fee for handling the case at all, a second one for litigation, a third one when evidence is taken; then there is an additional fee for settling the case. That means attorneys get two basic fees if the case is settled prior to employing a court, and four basic fees if the suit is settled through agreement after evidence has been taken in court. A lawyer-client arrangement on contingency fee

is prohibited by the ethical standards of the bar association and court ruling.¹⁷ Beside the fees, the litigation costs comprise compensation of the witnesses and experts if heard, and (usually small) amounts for expenses such as for xeroxing and the like.¹⁸

The most important aspect of the German litigation cost system is that it is governed by the fee-shifting principle. That means that a losing party is left with all costs: that of the court, of her own lawyer, her opponent's lawyer, and the evidence costs. This principle is extended to decisions of appellate courts with the consequence that the litigant who loses at the federal court is charged with the costs of three instances, even if he may have won before a lower court. But a suit may end up with neither party getting what originally demanded. Then the costs are split according to the winning/losing ratio. If, e.g., a plaintiff files for DM 100,000 and the court decides that the complaint is legally grounded only for DM 70,000, the costs are computed still on the basis of DM 100,000, but split at the line of leaving the plaintiff with 30%, and the defendant with 70% of the costs.

The West German litigation costs system is supplemented by a legal aid system that gives low-income people the opportunity to apply for public money

(cf. Plett 1988a). The application procedure includes an examination of income and a summary examination of the prospect of the lawsuit one has undertaken or been forced into. Hence an assessment of the litigation risk is given at the same time.

2.2 Past and Present Critique and Changes

Courts and court procedure have been, and are, criticized from different viewpoints and for different reasons. If I consider the German critique of their system, I can quite clearly distinguish between what traditional lawyers, and what socio-legal scholars disapprove of. They meet, to a certain extent, in their thinking about alternatives to the legal-procedural system. I am going to arrange my remarks in this order.

2.2.1 Duration of Civil Litigation

The most durable point of critique is the duration of civil procedure. It seems as if complaints over the duration of civil litigation never die. We find these complaints throughout the whole history of civil justice, and every new regulation was justified through aiming at acceleration of the processes. Soon after the introduction of the code of civil procedure, in 1877, with its liberal model leaving the process very much up to the parties, lawyers began to blame the

litigants for deliberate protraction. The remedy then was giving the judges more power to determine the pace of proceeding. This was repeated several times, last in 1976.

The operation of the appeal system is also considered as a factor in the duration of litigation. Especially the German system with its second full instance seems to be abundant. It may be a temptation for both judges and litigants, at the courts of first instance, not to proceed carefully if there is another occasion to present facts and evidence. Thus it is no wonder that this has been heavily criticized, and proposals have been, and are, made to eliminate one instance. However, the roots of the three-tier system go farther back than the code of civil procedure. As a matter of fact, the 1877 legislator of the civil procedural code had already unsuccessfully attempted to restrict the stages of appeal. But changes have been made, although they did not touch the system as such. Appeal is admitted only under certain preconditions (cf. note 8). The limits of the required amount still in controversy have been raised several times so that a larger number of lawsuits are excluded from appeal than earlier would have been the case.

Preclusion is a means that becomes effective on both the levels of the courts of first instance and

that of the courts of first appeal. Originally, the parties needed to present the court only as much information as necessary for the next step to be taken. This was then a reaction to bad experiences with the so-called eventuality principle, prescribing that the parties had to present at once all and everything they thought was important if they wanted it considered by the court. Observing this principle had led to swollen statements. But the division of a civil process into too many steps to be taken by the court and/or the litigants used to be a nuisance. Therefore the pendulum is now swinging back: litigants better give more than only the basic information, even if it is "just in case", because they might be precluded from being heard with late pleadings otherwise. The tendency of precluding the litigants from late pleadings becomes effective also in the stage of first appeal.

2.2.2 Barriers to Access to Civil Justice

All the criticism and respective reforms mentioned so far are related to an intended increase of the effectiveness of the judicial process, not to an improvement of access to civil justice in general. In 1969, however, a discussion began dealing with the problem that the right to legal protection constitutionally guaranteed to everyone was void in many cases due to the litigation costs.¹⁹ Although

Germany had a long tradition in legal aid, going as far back as to the early 19th century (cf. Trocker 1976), the old system of *Armenrecht* (legal aid for the poor) was considered as not being sufficient anymore, mainly because it did not provide for legal aid prior to a lawsuit was filed, or intended to be filed. Various solutions were proposed during the discussion of the problem in the 1970s, from a zero tariff to a mandatory legal insurance (cf. Grunsky 1976). Eventually, the federal legislator issued two new statutes providing for legal aid, in 1980: one replacing the old system of *Armenrecht*,²⁰ another one for those who seek only legal advice.²¹ This public system of legal aid is complemented by private legal insurance that became an important branch of the insurance industry recently (cf. Röhl 1987:451).

The discussion of legal aid in the 1970s coincided with a (temporary) blossoming of empirical legal sociology. While traditional law professors were concerned with legal costs as a barrier to access to civil justice, legal sociologists discovered many other barriers.²² Many people do not know their rights even if they have some, because legal education is not a part of general education. Then there is the language problem. It is difficult for claimants to make their claims clear to attorneys and judges; this is partly due to the specificities of the legal language, but has

also to do with societal strata. This problem is severe because legal advice is, in West Germany, almost completely monopolized with the attorneys-at-law. Only recently consumer advice centers are given the right to provide for legal advice.²³ But court representation remains with the attorneys, and any barrier to seeing a lawyer is a barrier to access at court at the same time (cf. Cappelletti/Garth 1984:263).

However, barriers emerge also from the party constellation. Inexperienced parties to a dispute ("one-shotters") are disadvantaged vis-à-vis their opponents if the latter are "repeat-players" (Galanter 1974), for several reasons. It is, for any litigant, often unforeseeable if required evidence can be proved. But a repeat-player can calculate the litigation risk on an aggregate level, whereas one-shotters have a risk they cannot distribute.²⁴ This increases a power-imbalance between such parties, that may exist anyway.

Another problem is related to the type of the dispute. Some disputes, especially those concerning personal problems, seem little suitable to be dealt with by lawyers and courts. They are usually complex, and a reduction of the complexity is inevitable when the dispute is transformed in one to be handled merely legally (cf. Gessner 1976; Falke/Gessner 1982), so that any legal result may be unfair. Other disputes that may

be equally unsuitable to legal treatment, could be called transpersonal: those being a product of a general social conflict²⁵ like, e.g., consumer, housing, labor, unemployment payment disputes. Civil litigation means dealing with individual disputes.²⁶ In these cases, however, it would be of greater help to those concerned if the substantive law would be reorganized to help the poor instead of letting them pursue their disputes individually. There was considerable legislation on such matters, in the 1970s. However, it is always a question whether or not an extension of legal protection is sufficient, depending on the political position. Those concerned with the underprivileged in the West German society, claim that the legislation of the 1970s was not going far enough. Opposed to that, the present conservative government (in power since 1982) has already cut back social achievements, and continues to do so.

2.2.3 Alternative Dispute Processing Mechanisms

It was hoped that alternative dispute resolution forms and fora could avoid at least those shortcomings of civil procedure which were connected with language and psychological barriers (cf. W.Gottwald 1981). As a matter of fact, there is a very old alternative: arbitration is as old as civil justice if not older. There was always even competition between

these two systems (cf. Krause 1930), so that arbitration may be considered as the alternative. But a new type of alternative has emerged in the context of the consumer movement in the late 1960s (Eidmann 1988). Many such mediation boards have been established since then for specific disputes like in the fields of car repair, dry cleaning, etc. (cf. Morasch 1984); and these are thought of when mentioning alternative mechanisms in West Germany (Plett 1988b). They have been erected by trade associations, sometimes together with consumer organizations. These alternatives to civil procedure were, in West Germany, first discussed in socio-legal circles (cf. Blankenburg et al. 1980), and came into public sight through a conference organized by the Federal Ministry of Justice in 1981 (cf. Blankenburg et al. 1982). Now the judicial administrations on the state and federal levels recommend the non-governmental institutions and boards by publishing booklets (under titles like "Mediation is better than adjudication"), in which the boards are briefly described and their addresses given, for distribution at consumer advice bureaux.

2.2.4 Improving Court Efficiency

Thus far, two different concerns seem to be prevalent: the efficiency of courts and civil procedure, and their accessability. Both approaches are

based on the conviction that civil justice is necessary and should be as good as possible. But they look at civil justice from different angles. The starting point for aiming at efficiency is the opinion that an institution which is there, as such should operate as well as possible for those who have already access, in order not to disappoint them. The starting point for accessibility takes into account those who may want to use the system, but are kept outside under its present organization. The problem is that the goals of efficiency and access contravene: making courts more efficient means taking off some of the burden, or at least avoid that the demand on them increases; improving access to court means exactly the opposite, namely that the courts become available also to those who were traditionally discouraged to seek judicial redress, for whatever reasons. Some changes in the German civil justice system, which have not been mentioned so far, are understandable only under an efficiency aspect.

We can affirm a gradually increased specialization and diversification of the court personnel. Originally the courts comprised only judges and court reporters. But then more and more tasks were taken from the judges and assigned to the staff, until the new office of the *Rechtspfleger* (comparable to the U.S. federal court magistrate) was invented (cf.

Bender/Eckert 1979). The *Rechtspfleger* has no academic legal education, but a practical one. The limitation of assigning tasks to the *Rechtspfleger* is set by the constitution: judicial tasks must not be performed by non-judges. This means that any decision in the substance of a case are left to judges. Nevertheless, the *Rechtspfleger* now deal with many important tasks of the civil courts (e.g., supervising bankruptcy proceedings) save processing contested lawsuits.

Moreover, we observe a specialization of the judges, which goes beyond the diversification of jurisdiction by establishing different branches (cf. *supra* 2.1). Judges working at civil courts²⁷ do not sit on every type of civil lawsuit, but we find special decision-making bodies for, e.g., rental matters, commercial lawsuits, copyright cases, bankruptcy, etc. This is organized by the presidents of the courts. In order to achieve such a specialization of the judges, the number of county courts has been considerably diminished in the last 15 years: in the 1960s, we had more than 800 county courts compared to 551 now. That this strikes against access is obvious: the lower courts of first instance are now less accessible to litigants from a geographical point of view (cf. Blankenburg 1974:277).²⁸

Besides, there is a statutory specialization that has been introduced in 1976: we now have family courts which are formally divisions of the *Amtsgerichte*. A family judge decides on nothing else than family matters comprising divorce, child custody, maintenance, visiting rights.

It seems completely correct to meet an increase in the demand on the courts with an increase in the employment of judges (cf. Johnson 1979:872). As a matter of fact, the number of judges has, in congruence with the general socio-economic development, steadily been increased during the first 25 years of the existence of the Federal Republic of Germany. This came to an end with the first oil crisis in 1973. But there are mechanisms available to increase the number of decision-making bodies without taking on more judges: decreasing the number of judges sitting in panels, or assigning tasks to single judges where originally panels were working. The first method was employed already in the 1920s.²⁹ The second one has been applied in the 1976 reform: the district courts now regularly decide by single judges instead of three-judge panels.³⁰ Moreover, the limits in value at stake (cf. *supra* 2.1) can be, and have been, changed. The limit for filing a complaint with a county court was originally DM 1000; it has been risen to DM 1500 in 1960; to DM 3000 in 1975; and to DM 5000 only in 1983.

The effect is that suits previously handled by district courts, with appeal possible to a high (and ultimately the federal) court have now to be filed with a county court, with appeal admitted only to district court. This decreases the number judges possibly engaged in a case, and can be justified only under efficiency aspects, but not be considered as an improvement of access to the civil justice system.

2.2.5 Private Responses

A private response to the demand on civil justice may be seen in the mediation boards offered by trade associations and the like, as described above (2.2.3). Most West German institutions offer their procedure for just a lump sum, or a fee that is at least below the litigation costs for the same cases. The associations having founded them provide for the infrastructure and pay the mediators, if these do not work on an honorary basis.

Another private response is to be seen in legal insurance which I briefly mentioned as a means of helping reduce the cost barrier. It seems to be a feature of the late capitalism that almost every risk can be insured. So it is no wonder that there exists legal insurance. One can presume that such an insurance would not be offered if there were no request, but, on

the other hand, it would not be offered either if no money could be earned through it. However, the impact of legal insurance is highly contested. Scholars with a law-and-economics approach claim that legal insurance contributes to the increase of demand on civil justice, because it releases the litigants from the (financial) litigation risk, and hence should be forbidden (Adams 1986). But there has been empirical research that shows that no increase can really be related to legal insurance (Blankenburg/Fiedler 1981). This result is supported by the thought that no insurer would deliberately insure a risk where he always has to pay, or the rates would be so high that no one could afford to pay the insurance (Schmidt 1986). Yet legal insurance remains to be of no help in getting access to civil justice for the poor, because one has at least to be able to pay the rates. So legal insurance can be considered as a private response to some deficiencies of the civil-procedure system, which nevertheless does not supply access for all who may need access.

2.3 Remaining Problems

The 1976 civil procedure reform was mainly based on the experience with the so-called Stuttgart model (cf. Bender 1979). One mechanism, in order to achieve the goals of the concentration principle was giving the judges the discretion to call the parties

personally to the hearing, even if they are represented by lawyers. Hearing of the parties seems to facilitate settlement. The explanation for this effect is that it sometimes suffices to provide the parties with a forum where they are heard,³¹ and maybe counter-effective to treat the dispute just formally. However, this requires that the lawyers -- judges as well as attorneys-at-law -- are educated accordingly. They must be enabled to handle disputes not only under the legal aspects, but also to deal with disputants properly. It does not make sense at all to call the parties in, and not let them tell their respective stories to the dispute. So legal education comes into sight. Actually, there was a period in West Germany when legal education was under reconsideration. Teaching not only the law itself but the context of law was the main objective of a new type of education that was aimed at during the 1970s. It was run as a reform model,³² but the result was going back to the old type of education because of political changes in the late 1970s and early 1980s.

Another problem is how to coordinate public and private responses to the deficiencies of the civil justice system. This is, in West Germany, mainly a problem of the alternative institutions. Giving (professional and legal) advice to their members, belongs to the tasks trade associations always have had. They are also required to see that disputes

between their members and the customers of their members are settled. But they tend to formalize the settlement procedure offered, obviously oriented by commercial arbitration. The major problem is that an individual consumer has no influence on the composition of the panel of mediators, and equal representation of both sides to the dispute is not guaranteed by all boards (cf. Nicklisch 1981). Moreover, there is neither a legal minimum standard as to how proceed, nor monitoring provided.³³ The danger that not all the boards have a neutral or balanced panel, cannot be denied. The problem is that, on the one hand, the road to litigation is not locked, but, on the other hand, a pre-decision of a dispute handled by them cannot be excluded. So if a consumer seeks redress at these mediation boards, he or she has to be afraid that a pre-existing power imbalance to the opponent will continue (cf. Micklitz 1982; Hegenbarth 1983; Plett/Eidmann 1987; Plett 1988b). The lack of supervision is even sharpened by the fact that some of these boards do not admit party representation. So what seems as an extension of access to law may turn out as yet another barrier in pursuing a claim: it is too expensive to go to court, and the seemingly helpful institution cannot be fully trusted, because the association to which the opponent belongs has provided for the alternative.³⁴

Finally, it has to be asked if the reproach that civil processes last too long is still really true. When considering the minimum data (cf. at note 12), the average duration from filing a civil suit to disposition at the courts of first instance does not seem extremely long (cf. tables 4-5).³⁵

We also have to affirm that the demand on the courts as expressed in the figures of the caseloads is not as huge as often is claimed. Fortunately, the count of court files is one of the very oldest statistics available. So we can make assertions covering a very long period, and, interestingly, we find that there were in fact almost three times as many complaints filed at civil courts in the late 1920s and early 1930s as in the late 1970s and early 1980s (Rottleuthner 1985:235-39).³⁶ Thus basing an assertion on the data of only the past five to ten years means inverting the truth. Yet the data may pretend to a reality which is actually unknown, because we have no information on the contents of the lawsuits of that time. Perhaps the suits were less complex than they are now, but in fact we do not know. However, presuming a steady increase does not conform with the empirical data. Also the demand on the appellate courts is not so heavy that alterations of the system would contribute very much to the desired relief of the courts (cf. tables 3a and 12; P.Gottwald 1985). This was at least the result of a

recent conference organized by the Federal Ministry of Justice (cf. Gilles et al. 1985), so that the call for changes of the appellate system is not too loud anymore.

3. DISCUSSION

What can we learn from the German experience? I think it is not permissible to recommend any feature of its court organization or civil procedure as an example, e.g., that making civil procedure judge-centered would help release the demand on the courts. We may, however, find some structures that might be of transnational importance, so that being aware of these could help with reforms that have to fit to the specific system anyway (cf. Friedman 1978:30-32).

3.1 Lack of Clarity about the Goals

The call to improve the civil justice system is as widespread as its critique. But what do the critics mean when they demand a better judicial system? It very much depends on the vantage point from which the system is viewed, and the expectations placed on it. Only on a very high level of abstraction, an agreement seems possible: accessible courts, accurate decisions and the protection of individual rights are

goals (cf. Cappelletti/Garth 1984:265) no one living in a modern society would possibly deny.

How this could be achieved would be easier to find out if we had a clear description of the function of civil justice. But we do not. I mentioned the development from the corporate via the liberal to the social welfare state and the assumed impact on the justice system. Whether or not a consensus about the welfare state can still be affirmed (some doubt is permitted), we cannot disregard from minor changes that may happen during the long periods involved, i.e., the critique and intended reforms of a civil justice system are bound up with current notions, and what may have been acclaimed yesterday may be outdated today.³⁷ But not only that. We never have just one notion prevalent in our pluralistic society. Different social agents involved in the civil justice system have different ideas about its function, criticize different aspects and favor different reforms. It may even be the case that the same aspects are criticized, but from different points of interest. The duration of civil litigation may serve as an example: it can be seen as a barrier to access to justice from a litigant's point of view³⁸ (it delays the pursuit of a genuine claim), whereas long-lasting processes may be considered as indicating a lack of efficiency from an administrative

point of view, and administrators come under pressure if there is more to be done than can be dealt with.

Hence we can establish different -- or rather, conflicting -- goals guiding the idea of improvement of civil justice. Those who provide the civil justice system (the state, or more precisely, the people representing the state) draw, from the shortcomings, the conclusion that the system has to become more efficient, while the system's actual or potential customers demand better and expanded access. Things become even more complicated when we take into account that of course efficiency is a goal also aimed at by the customers, and provision of access is an objective of the government as well. However, what seem to be the same ends nevertheless serve different functions: as a party to a dispute I want an efficient court system in order to get an optimal result in reasonable time at a fair price; efficiency from the government's viewpoint means balance of input/output on an aggregate level.

We have therefore to ask, when dealing with access-to-civil-justice problems: whose interest does access serve?; which barriers to access do we know?; how could the barriers be removed?; what are, or would be, the consequences of free access to the courts for

all?; how could mechanisms work together in order to avoid extreme results?

3.2 Barriers as a Steering Mechanism

Looking at civil justice in the long run, there seems to be one constant criticism, namely that of duration, whether or not this reproach is justified (cf. text *supra* at note 35). Of course the duration is interrelated with the demand on civil justice: if the framing conditions (number of judges and the like) are not adapted, more lawsuits in number and/or complexity mean longer periods of getting them disposed of, and longer periods needed for disposition of cases mean more cases on the court dockets at any given time. This leads to a severe problem. The demand on the justice system increases at times which are economically characterized by recession (cf. Rottleuthner 1985). This has the consequence that an increased demand coincides with budgetary restrictions of the public households. So the remedies requiring spending public money are less likely to be employed: increasing the judiciary, supplying legal aid, improving the substantive law by giving more rights to the underprivileged if that would mean an additional demand on the public households. Therefore every means and mechanisms which promise to take cases from the court dockets are very much favored in those times (cf.

Johnson 1979:873) even if they do not meet the standards basically wanted by all those involved in the system, or, even worse, if they would mean taking rights from citizens.

Anyway, barriers to access serve, on the aggregate level, as a steering mechanism. This becomes evident when we consider two extreme points. If everyone having a complaint could go to the official courts without being afraid of losing money for procedural costs (= justice at a zero tariff), then the courts would most probably be flooded by requests of citizens (whether personal or corporate) to look at their claim for its legal reason. If everyone had a right to get a judgment on whatever complaint, even the attorneys became jobless: why seeing a lawyer in private practice if a judicial answer were available at no risk? It obviously does not go without any barriers, even if it seems most likely that mechanisms different from the present ones would emerge to prevent from such a result.

On the other hand, if the state would provide for civil justice only on an economic basis of efficiency, i.e., on a mere cost/benefit analysis, then almost unsurmountable barriers would be best: much money could be saved if there were next to nothing demand for judicial work. But such a result cannot

possibly be legitimized; it would mean going back to the middle ages.

But where neither of two extremes seems desirable, there has to be sought for a middle way, and for finding this, criteria have to be developed. The problem is that different interests in civil justice are involved, which all seem from their own perspective rational and may provide criteria.

No doubt the state has to provide for justice in general, and civil justice specifically. This is to be done by building courtrooms, employing judges and other court personnel, and setting minimum standards for a fair procedure. This is obvious, but here we have already mechanisms which provide for more or less access, less or more efficiency. If changes are made, it should be natural that deterioration of access has to be especially legitimized and compensated. An outcome that does not improve anything should be avoided at all. An example may illustrate this. Organizers of any kind seem to think that large entities provide for more efficiency than small ones. A result of this thinking was, in West Germany, the reduction of the number of county courts, decreasing access, not necessarily the number of judges at the same time, nor the efficiency of the civil justice system (cf. Blankenburg 1974).

The most efficient steering mechanism are seemingly the costs. But it is still an empirical question whether or not potential disputants can be deterred by costs to seek judicial redress as the German example shows (cf. at note 21; and if this really were true, U.S. Americans could not complain about overcrowded dockets). However, the cost factor is not a simple one. We may have low filing fees, but high processing costs. It may be the other way around. What seems necessary is a balanced system that provides for payments by those who can afford it, and aids the poor.

The formality of legal proceedings was established as yet another barrier to access, so that a simple procedure seems to facilitate access. But again, this is not true in every case. If a case is very complex, the procedure just cannot be simple. And if the leading idea is a fast process, substantial justice may go lost underway: putting swift disposition at the top of the goals sets the judges under pressure, with the consequence that they decide only along criteria readily at hand, and do not feel challenged to render carefully grounded decisions (cf. Schmidt 1987:267).³⁹

3.3 Coordination of Public and Private Responses

If raising or lowering the barriers to access to civil justice seem the natural remedies of

governments to deal with the demand on courts, we find, in capitalistic societies, also private responses. This is permissible because freedom of contract, or private autonomy, is the ideology of civil law in all western systems. However, everyone knows that the basic assumption of private autonomy does not stand up to social reality, namely the equality of citizens. Therefore civil justice -- the provision of which is a public task -- ought to see for balancing socio-economic power imbalances. Consequently, public and private measures which both deal with the same subject of provision of civil dispute processing, have to be coordinated. We have found two of such private responses, in the West German experience.

Private legal insurance is designed to facilitate access to the courts. However, as it is, it cannot replace a public legal aid system because the very poor cannot afford to pay the rates. Thus private legal insurance may serve as a supplement in the system for those citizens who are not eligible to legal aid, but would be expected too much to pay full litigation costs out of their pocket. (One might even think of making legal insurance mandatory to middle-income people in order to make the legal advice and litigation cost system really dense.)

The second private response was observed in the new mediation boards founded by (privately organized) associations. However, if we want to rely on dispute processing procedures outside the law courts, we have to ask if such private responses fit to the official system. Whether or not they really contribute to improve access to justice, depends on the answer to the question if they aim at individual justice as law courts (ought to) do. If the government itself regards these boards as complementing the civil justice system, it seems indispensable to coordinate the private and public dispute resolution modes, at least if the private provision is meant to replace civil justice and not only to be an additional offer to disputants' without consequences for a subsequent lawsuit. The German mediation boards do not have the safeguards of commercial arbitration (cf. note 33).

It seems not a good idea to leave disputants with saying that they can settle their case in institutions which do not provide for the same process safeguards as civil justice -- in spite of it deficiencies -- does. If privatization of justice seems promising to some, it should not go without seeing for and governing fundamental principles like the right to be heard, the right for representation, and the right for judicial redress.

3.4 The Interrelation between Substantive Law and Dispute Processing Procedures

Altering the legal frame is the first remedy traditional lawyers get into mind if they want to meet criticisms, at least in civil-law countries. However, neither the efficiency of the justice system can be improved, nor the barriers to access to justice be removed, through a mere change of the procedural laws. Any court reform -- with or without external restrictions -- falls short if it is considered a mere technical matter.

Dispute processing procedures -- whether public or private -- are designed independently of the type of the dispute (even if with some specific variations): they assign the roles of the claimant/plaintiff and opponent/defendant (plus the mediator/arbitrator/ judge). However, who eventually performs which role depends on who bears the burden of taking action, and this depends very much on the related substantive law. Hence we find quite different types of civil disputes, even if the processing rules remain the same. Anybody who wants to alter a given situation has to take action (i.e., eventually go to court) if the opponent does not agree to the change (Röhl 1981). Thus the one who has the *status quo* on his or her side is in a stronger position right from the beginning. This imbalance caused by substantive law is

aggravated if we take into additional consideration the difference between "one-shotters" and "repeat-players" (Galanter 1974): the one for whom going to court is an everyday business can calculate the litigation risk on an aggregate level, i.e., suing or being sued has not the same importance as it has to a person who sues or is sued once in a lifetime. Therefore a one-shotter with the *status quo* fighting for their opponent is in the weakest position to be thought of.⁴⁰

There is another problem, this time connected with both substantive and procedural law, or their interrelation. Civil procedure is designed for individual disputes. However, many disputes that may ultimately be handled in the civil courts are actually just part of a larger social conflict.⁴¹ In this case, the juridical system does not seem the suitable location for fighting such general conflicts, because dozens of individual outcomes (which may even differ from one another) cannot substitute for a general solution (cf. Johnson 1979:875). Thus any reform of the civil justice system will fall short for those cases where a reform of the substantive law could solve thousands of similar disputes.⁴² The consequence is that the legislator can implicitly take some of the courts' burden off.

In general, the functioning of substantive law as a barrier to civil justice should not be underestimated: who is denied a legal claim even if a claim seems justified under social aspects, has no chance to pursue this claim by civil procedure: the best procedure cannot help if the substantive law does not support the claim.⁴³

On the other hand, an improvement of substantive law requires securing through procedure, because a right that cannot be pushed through is worth nothing. Therefore the interrelation of civil justice (as a process) with substantive law, the recognition of social conflicts as the background of the demands on civil justice have to be taken into account. If nothing is done to improve what could and should supplement court reform, it will most probably be in vain.

3.5 The Contribution of the Sociology of Law

The academic discipline which helps most in uncovering facts and underlying assumptions is the sociology of law. Empirical legal sociology now possesses a history of almost two decades, and much has been discovered that was previously unknown. This is above all true for civil justice and civil disputes in general.⁴⁴

We owe to legal sociology our insights in many fields, such as the function and the societal frame of civil justice; the sociology of lawyers, their socio-economic background, their interests, their position in the society; the objectives of the parties to a dispute, and both objective and subjective goals of civil procedure; the judicial process itself, strategies of those involved, the transformation of social disputes into legal ones; specific procedures for specific disputes such as those concerning the family (divorce, child custody, maintenance); the organization of courts; the way of finding a legal decision; the duration of litigation, including the reasons for what is considered delay; alternative procedures within and outside the official courts; and access and barriers to justice, including some of the remedies for the barriers.⁴⁵

All this empirical research shows the subject to be highly complex. It is desirable that this complexity is taken into account if and when measures to improve the civil justice system are discussed. This could be achieved best through a continued dialogue between practitioners and academics, scholars with a dogmatic and those with an empirical approach, administrators, politicians, and the general public. It would be a waste of public and private resources (intellectual and emotional as well as financial), if

the result of all efforts made would be another time what the West German national reporter to the VIIth International Congress on Procedural Law at the panel "The Contribution of Legal Sociology to Procedural Reform" then has established: "Lots of confusion, some inspiration and little innovation" (Gilles 1983b:142). However, such a reproach does not fit the conference for which this report was prepared.

COURTS 1979

ONTARIO

H. J. Kirsh and H. B. Radomski, "The removal of county court actions to the Supreme Court of Ontario." (1979) 2 Advocates' Q. 28.

County Court jurisdiction is \$7500 or less. In certain circumstances a defendant or plaintiff may have the case heard in the Supreme Court of Ontario. The authors considers the mechanics of the process of moving a case to the Supreme Court and the potential advantages or disadvantages of a hearing in either court. Time and costs are primary issues. A case with multiple defendants or a complex case may be better heard in the Supreme Court. However, it may be to the defendant's advantage to have it heard in the County Court where both costs and the usual amount of damages awarded may work in his favour. The authors cite the options available to both parties, and recommend a serious consideration of the substantial advantages which may be provided by a careful assessment of all the factors.

ADMINISTRATION OF JUSTICE 1980

B. Laskin, "Some observations on judicial independence." (1980)
4 Prov. Judges J. 4:17.

The author deals with the method by which judicial independence and a perception of judicial independence is to be achieved. He stresses that Charter issues in particular require that this principle be followed. Three institutional arrangements assure this: 1. Security of tenure. 2. Fixed salaries 3. Immunity - freedom of speech. He further states that judges must have independence in administration and budgeting and that it is not appropriate to have judges as heads of administrative agencies on a long term basis. Judges must not engage in political controversy over legislation unless that legislation is unconstitutional. Political powers need to understand and recognize this need for judicial independence.

In Québec, there has always existed a two-level appeal procedure, one to the Court of Appeal of Québec and the other to the Supreme Court of Canada. The right of appeal and the manner of exercising such right have been a longstanding concern for a large number of people especially in recent years. The topic is so broad that the Canadian Institute for the Administration of Justice has scheduled two days of discussion on it at a national conference to be held in Montreal from August 17th to August 19th 1988. This paper will focus mainly on some of the assertions and issues to be fleshed out at the next August conference.

When writing about the Court of Appeal of Québec or the Supreme Court of Canada, there is reluctance to express one's real feelings on this issue not just for reasons of decorum but also out of fear. In this paper, we will simply restate some of the informal views circulated over the last few years.

One of the most frequent complaints about the Québec Court of Appeal is aimed at the rules for appealing an interlocutory judgment, and applying for leave to appeal as well as at the period of time required before a final judgment is handed down.

The Québec Legislature has for all practical purposes abolished appeals as of right from

interlocutory judgments except in two cases. Leave to appeal is granted by a judge sitting alone and where "he is of the opinion (...) the pursuit of justice requires that leave be granted".¹⁰² Therein lies a discretion and uncertainty which make counsel uneasy.

Moreover, according to the broadened definition of the concept of hearing, leave to appeal might be granted depending on the time at which the judgment was handed down and on whether a trial judge has been appointed to hear the case. As an example, it seems that a judgment rejecting an amendment could be heard by the Court of Appeal with leave provided that such judgment was handed down before the hearing began, that is before a trial judge was appointed to hear the case on its merits (a judge may be appointed several months before the actual hearing). On the other hand, once a judge is appointed, a judgment denying the amendment is considered to have been handed down during trial and thus only becomes appealable at a later stage together with the final judgment. If it is found that the appellant had grounds to appeal from the interlocutory judgment, the Court of Appeal will then refer the matter back to the lower court or assume the role of a court of inquiry for the purposes of the case.

Restrictions on appeals to the Supreme Court

of Canada have generated deep-seated discontent not only among counsel but also among court users who must face these limitations without knowing the underlying reasons. At this point, some of the objectives of the Canadian Institute for the Administration of Justice contained in the pamphlet circulated for the August 1988 conference should be quoted:

...the substantial legislative changes of the last few years have encouraged the proliferation of lawsuits and increased the desire of litigants for access to appellate review after the initial proceedings.

Today, most cases that raise serious legal questions are finally determined in the provincial appeal courts, which are not fully able to provide the direction in the law required for the harmonious development of Canada's legal system.

The Canadian Bar Association in a report entitled "The Supreme Court of Canada" and made public in August 1977 pointed out "the serious concerns of the Canadian Bar which feels that over the last few years the court has granted fewer leaves to appeal, decided on fewer cases, allowed a backlog of cases to build up and taken more and more time to decide on others..."¹⁰³

It is often stated that, the Supreme Court of Canada is not "a court of error, it is a court of law". In other words, the court will not hear cases simply

because a judgment of the Court of Appeal is mistaken or unjust; the court tends to confine its jurisdiction to matters it considers important and providing it can devote enough time to such matters. This philosophy is not popular with counsel, even less so with court users. Is this what supreme justice is all about?

It is our feeling that, in view of the Supreme Court's own track record up until 1975, procedural changes are due. We believe that the Supreme Court should hear cases where an error or an injustice has been committed that can be remedied by the Court. Such a philosophy would be more socially marketable, whereas denying leave to appeal under the present one can hardly be explained to the unsuccessful applicant. The quality of justice in Canada is at stake. Are we willing to pay the price for improvements all the way up the system?

The quality of justice and the redress of as many injustices as possible by appeal courts is essential to maintain social peace in the medium and long term. Could the role of justice be conceived otherwise?

CONCLUSION

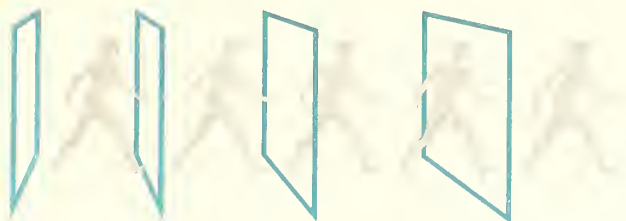
As indicated earlier, much progress has been

made in Québec over the last 20 years in terms of improved access to justice. Basically, the concrete steps taken in this context include the creation of Small Claims Court, the implementation of a legal aid plan for the benefit of low income people, the adoption of the class action procedure as well as the creation of a government supervised system for the collection of support payments. Furthermore, intensive efforts have resulted in a substantial reduction of waiting periods in civil courts.

Yet, there are still important barriers that middle-class people must overcome in terms of access to justice. For instance, there remains the eternal problem of the high costs of justice from the point of view of both court fees and extra-judicial fees. It is hoped that a greater dissimulation of information on prepaid legal services might help citizens to overcome the cost obstacle.

The complex structure of administrative and judicial tribunals in Québec generates unfavorable biases among citizens as well as normally expected apprehensions hindering access to justice. It is hoped that the bill aimed at amalgamating certain judicial courts and tabled before the National Assembly last May will help eliminate this psychological barrier. By the same token, the amalgamation of administrative

tribunals as proposed by the Task Force on administrative tribunals should also be included in an amendment bill in the near future. Lastly, certain changes in the appellate structure of tribunals should also be made in order to improve access. The future looks bright, however it is now time for government to act in concert with judges and lawyers.



Conference
on Access to
Civil Justice

Congrès sur
l'accès à la
justice civile

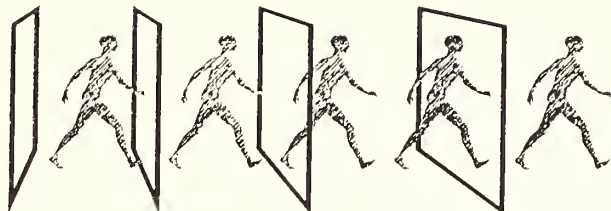
**Access to Civil Justice:
A Review of Canadian Legal Academic Scholarship
1977 - 1987**

**for the
National Conference on Access to Civil Justice
Toronto : June 20-22, 1988**

**by
Mary Jane Mossman* and Heather Ritchie****

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Conference
on Access to
Civil Justice

Congrès sur
l'accès à la
justice civile

THE COST OF JUSTICE: MAKING THE SCALES BALANCE

Outline of Remarks

by

Yves Lafontaine

President

Commission des services juridiques

Tuesday June 21, 1988

I WOULD LIKE TO THANK THE ORGANIZERS FOR INVITING ME AND FOR ALLOWING ME TO SPEAK TO YOU IN MY MOTHER TONGUE.

- INACCESSIBLE JUSTICE MEANS INJUSTICE, OR NO JUSTICE.
- JUSTICE IS NOT ONLY JUDICIAL.
- THE NON-JUDICIAL PORTION IS PERHAPS LESS COSTLY AND MORE EFFECTIVE.
- RESOURCES ALLOTTED TO JUDICIAL JUSTICE CAN BE CONTROLLED AND PREDICTED.
- BUDGET ALLOCATIONS WILL FOLLOW IF THE DEMANDS ARE REASONABLE AND CONSIDERED A PRIORITY BY THE PEOPLE.

* * * *

MY THOUGHTS TODAY WILL DEAL WITH THESE FIVE TOPICS. I SHALL DWELL ON THE FINANCIAL RESOURCES REQUIRED IN ORDER TO GET AS CLOSE TO THE IDEAL AS POSSIBLE, AND ON THE MEANS OF OBTAINING THOSE RESOURCES. AS REGARDS COST, I WILL TELL YOU ABOUT THE QUEBEC EXPERIENCE.

"INACCESSIBLE JUSTICE IS PERCEIVED AS AN INJUSTICE".

THIS STATEMENT DOES NOT REQUIRE LENGTHY EXPLANATIONS. EVERY STUDY AND PUBLICATION, PARTICULARLY THOSE OF EARL JOHNSON AND MAURO CAPPELLETTI IN THE U.S. AND THROUGHOUT THE WORLD, FROM THE PREVOST COMMISSION IN QUEBEC TO THE OSLER, GRANGE AND ZUBER REPORTS IN YOUR PROVINCE, HIGHLIGHT THIS SAME PRINCIPLE.

THIS IS A COMMON-SENSE OBSERVATION. THE SENSE OF JUSTICE IS DEEPLY ROOTED IN HUMAN BEINGS. WHEN A CHILD BEGINS HIS SCHOOLING, HE REQUIRES JUSTICE FROM HIS PARENTS AND EDUCATORS. THIS DEMAND FOR

JUSTICE IS EXPRESSED BY CHILDREN AS "IT'S NOT FAIR" OR "I HAVE THE RIGHT, DON'T I?" HOW MANY TIMES HAVE WE SEEN AN INDIVIDUAL WHO FEELS, RIGHTLY OR WRONGLY, THAT HE IS A VICTIM OF INJUSTICE AND WHO WASTES HIS LIFE AND OFTEN THAT OF HIS FAMILY AS WELL BY HAVING ONLY ONE CONCERN, OVERTURNING THE INJUSTICE DONE TO HIM. SUCH INDIVIDUALS WRITE TO NEWSPAPERS, POLITICIANS, THE BAR ASSOCIATION AND THE QUEEN AND INCREASINGLY LOSE TOUCH WITH REALITY, BLINDED AS THEY ARE BY THEIR QUEST FOR JUSTICE. QUEBEC SUPERIOR COURT CHIEF JUSTICE GOLD TOLD ME: "IT IS FINE FOR YOU TO HANDLE MRS. X'S (THE SEX IS IRRELEVANT HERE) CASE, BUT I AM AFRAID THAT IF YOU SUCCEED SHE WILL DIE!".

DEPRIVATION OF ACCESS TO JUSTICE IS PARTICULARLY RESENTED BECAUSE SOME PRIVILEGED PEOPLE HAVE ACCESS TO IT, I.E. MOST CORPORATIONS AND THE WEALTHY. FOR A THIRD-WORLD PERSON, HIS POVERTY HAS BECOME MORE DIFFICULT TO BEAR SINCE TELEVISION HAS BEEN FLAUNTING ALL THE THINGS TO WHICH HE HAS NO ACCESS! WITH THE EMERGENCE OF CHARTERS AS THE BASIS FOR THE SOCIAL CONTRACT, WHICH ENSHRINES THE PRINCIPLE OF THE RIGHT TO EQUALITY AND THE RIGHT TO A LAWYER, THE PERCEPTION OF THE LACK OF THESE ITEMS HAS BEEN HEIGHTENED. THE MORE A SOCIETY IS BASED ON RIGHTS, THE MORE UNJUST WILL SEEM THE LACK OF MEANS TO ACHIEVE THOSE RIGHTS.

HOWEVER, JUSTICE IS NOT ONLY JUDICIAL. FORTUNATELY!

THE IMPRESSION OF LIVING IN AN INCREASINGLY FAIR SOCIETY DOES NOT DEPEND EXCLUSIVELY ON ACCESS TO THE COURTS. IT ALSO DEPENDS ON LAWS AND REGULATIONS BETTER SUITED FOR THE INTERESTS OF THE CITIZENS AND, ABOVE ALL, BETTER KNOWN TO THE POPULATION. THE LESS AN INDIVIDUAL KNOWS THE RULES OF SOCIETY, THE MORE HE WILL FEEL ALIENATED. SOMEONE WHO DOES NOT KNOW THE RULES OF A GAME FEELS UTTERLY LEFT OUT. IN MANY INSTANCES, PEOPLE (AT LEAST THOSE WHO CAN) HAVE TO USE THE COURTS BECAUSE THEY DO NOT KNOW THE LEGAL PROVISIONS APPLICABLE TO THE TRANSACTION THAT IS AT THE ROOT OF THEIR PROBLEM, WHICH HAS BECOME A JUDICIAL ONE.

IN ADDITION TO GIVING THE IMPRESSION OF A MORE JUST SOCIETY, LAW OR REGULATORY REFORMS COMBINED WITH THE LEGAL INFORMATION REQUIRED FOR THEIR DISSEMINATION, ARE EFFECTED AT MINIMAL COST MOST OF THE TIME, PARTICULARLY IF ONE COMPARES THEM TO THE COSTS GENERATED BY THE COURTS AND THEIR ATTENDANT PARAPHERNALIA.

IN THE LEGAL FIELD, EXAMPLES IN SUPPORT OF MY STATEMENT ARE THE SMALL CLAIMS COURT AND THE USE OF AFFIDAVITS IN MATTERS OF DIVORCE OR SEPARATION.

IN QUEBEC, LIKE IN MOST PROVINCES, THERE IS A PROVINCIAL COURT DIVISION TO WHICH A PERSON CAN SUBMIT CASES INVOLVING LESS THAN \$1,000. LAWYERS HAVE NO ACCESS TO IT AS ATTORNEYS. COSTS ARE LIMITED TO THAT OF FISCAL STAMPS, I.E. A MAXIMUM OF \$30. THERE IS NOTHING TO PREVENT SUCH A SYSTEM FROM BEING EXTENDED BEYOND \$1,000.

SIMILARLY, THE EVIDENCE BY AFFIDAVIT NOW ACCEPTED IN CASES OF DIVORCE AND SEPARATION SHOULD REDUCE COSTS. I SAY "SHOULD" BECAUSE THERE IS ALSO THE POSSIBILITY THAT ANOTHER JUSTICE-SYSTEM INTERMEDIARY, I.E. THE LAWYER, MAY POCKET THE SAVINGS THUS EFFECTED. WITH A COMPLETELY FREE MEDIATION SERVICE ATTACHED TO THE COURT AND AIMED AT ACHIEVING A SETTLEMENT DESIRED AND CHOSEN BY THE PARTIES, THE NEED FOR LAWYERS AND JUDGES TO BE PRESENT COULD BECOME MORE EXCEPTIONAL.

BY INFORMING THE PUBLIC THAT, UNDER THE QUEBEC CONSUMER PROTECTION ACT, A CONTRACT WITH A TRAVELLING SALESMAN CAN BE CANCELLED BY RETURNING THE MERCHANDISE WITHIN FIVE DAYS OF THE CONTRACT WOULD SIMPLIFY THE LIFE OF THE INDIVIDUALS UNHAPPY WITH THE MERCHANDISE AND IT WOULD SHOW THEM THAT THE STATE IS NOT THERE ONLY TO PUNISH THEM, BUT ALSO TO PROTECT THEM.

AS REGARDS LEGAL INFORMATION, THE BENEFITS FAR OUTSTRIP THE INVESTMENT. THESE LEGISLATIVE MEASURES REDUCE OR COULD REDUCE THE TOTAL COST OF JUSTICE EVEN WHILE HUMANIZING IT.

A WELL-DESIGNED PUBLIC LEGAL INFORMATION PROGRAM COULD ALSO SHOW THE PEOPLE, AT LITTLE COST, THAT THE LAW IS MADE FOR THEM AND APPLIES TO THEIR EVERYDAY LIFE. THIS INFORMATION COULD ALSO MAKE THE INDIVIDUAL AWARE OF HIS OBLIGATIONS TOWARDS THE OTHERS AND SOCIETY IN GENERAL.

LAST YEAR, FOLLOWING THE AMENDMENTS TO THE CRIMINAL CODE REGARDING DRUNK DRIVING, OUR LEGAL SERVICES COMMISSION PREPARED A ONE-HOUR DRAMATIZATION SHOWING THE HANDLING OF A DRUNK DRIVER, FROM HIS ARREST TO HIS EMPRISONMENT, INCLUDING THE BREATHALYZER TEST. THE PROGRAM WAS BROADCAST BY THE COMMERCIAL NETWORKS ON DECEMBER 12. I AM CONVINCED THAT MANY PEOPLE DECIDED NOT TO DRINK EXCESSIVELY OR NOT TO DRIVE BECAUSE THEY SAW THE PROGRAM. ALTOGETHER, 837,000 PEOPLE SAW THE BROADCAST.

IT IS DIFFICULT TO QUANTIFY THE DIRECT SAVINGS TO THE LEGAL SYSTEM IN TERMS OF COURT, JUDGE, LAWYER, POLICE AND EXPERT TIME. THE FACT IS THAT THE NUMBER OF ARRESTS FOR DRUNK DRIVING HAS DROPPED SIGNIFICANTLY RELATIVE TO THE PREVIOUS YEAR. MOREOVER, THE COST OF AUTOMOBILE INSURANCE, HEALTH CARE, DRUGS AND PHYSICIANS MAY HAVE BEEN REDUCED, NOT TO MENTION A LIKELY REDUCTION IN SOCIAL COSTS, SUCH AS QUARRELS, ANXIETY AND PERHAPS THE COST OF A DIVORCE. ANOTHER LIKELY IMPACT: HAVING SEEN THE PROGRAM, THE INDIVIDUAL WHO IS ARRESTED KNOWS HIS RIGHTS AND ACCEPTS THE PENALTY MORE READILY.

IT MAY THEREFORE SEEM PARADOXICAL THAT IT IS PRECISELY THE LEGAL INFORMATION TO THE PUBLIC THAT THE TREASURY BOARD IS TARGETING WHENEVER IT WANTS TO CUT COSTS. THE TREASURY BOARD ARGUES, NOT WITHOUT REASON, THAT THE MORE INFORMATION WE GIVE OUT, THE MORE OUR SERVICES BECOME KNOWN, AND THE MORE PEOPLE ARE GOING TO WANT THEM. WHOEVER DOES NOT GET AN ANSWER TO HIS PROBLEM FROM GENERAL INFORMATION WOULD BE TEMPTED TO KNOW MORE AND, IN SOME CASES, ONLY LEGAL PROCEEDINGS WILL BRING PEOPLE TO REASON IN VIEW OF THE COST INVOLVED.

POLITICIANS THINK THAT BY CUTTING INFORMATION AND PREVENTION, THEY ARE NOT RESTRICTING DIRECT SERVICES TO THE CLIENTELE. INDEED, THE COMPLAINTS RECEIVED BY THEIR CONSTITUENCY OFFICE WILL CERTAINLY NOT COME FROM CITIZENS DEPRIVED OF DIRECT SERVICES, NOR FROM A PUBLIC THAT DOES NOT KNOW WHAT IT IS BEING DEPRIVED OF. THIS, HOWEVER, IS SHORT-TERM THINKING.

UNCONVINCED OF THE BENEFITS OF LEGAL INFORMATION AND OF THE IMPACT OF THE LEGISLATIVE AND REGULATORY MEASURES AT THEIR DISPOSAL, POLITICIANS ARE UNDER THE IMPRESSION THAT THERE IS NEVER GOING TO BE ENOUGH MONEY TO MEET THE LEGAL REQUIREMENTS OF THE PEOPLE, GIVEN THEIR NUMBERS AND THE COSTS INVOLVED IN MEETING THEM.

OUR EXPERIENCE IN QUEBEC OVER THE LAST FEW YEARS TENDS TO PROVE THE CONTRARY, I.E. THAT IT IS POSSIBLE TO MEET THE LEGAL REQUIREMENTS OF A SUBSTANTIAL PORTION OF THE POPULATION AT PREDICTABLE, REASONABLE COST AND TO QUEBECERS' SATISFACTION.

INDEED, LONG BEFORE THE CHARTERS, THE PROVINCE TOOK THE STEP OF ENSHRINING LEGAL AID AS A RIGHT, FOR AN ECONOMICALLY DISADVANTAGED PERSON, TO HAVE FREE ACCESS TO THE SERVICES OF A LAWYER OR A NOTARY AS WELL AS TO LEGAL INFORMATION.

BY POSITING LEGAL AID AS A RIGHT RATHER THAN A PRIVILEGE OR CHARITY, THE LEGISLATOR CONTRACTED - PERHAPS UNWITTINGLY - THE OBLIGATION TO PASS LEGISLATIVE AMENDMENTS, WITH ALL THAT THIS ENTAILS IN TERMS OF PUBLICITY AND POTENTIAL CRITICISM, IN ORDER TO AMEND THE SYSTEM. SIGNIFICANTLY, THE ONLY ATTEMPT AT MINOR MODIFICATION OF THE SYSTEM - THE LEVYING OF AN ARBITRATION FEE - CAUSED SUCH AN UPROAR THAT THE REGULATION WAS NOT PROMULGATED.

THE PURPOSE OF LEGAL AID IN QUEBEC IS TO MEET THE CLIENT'S LEGAL NEEDS. TO MAKE A POINT, I WOULD SAY THAT LEGAL AID IS NOT A FINANCIAL BENEFIT TO THE PROFESSION. IN PRACTICE, THIS BASIC ORIENTATION

IS ENSURED BY THE FACT THAT LEGAL AID IS DIRECTED BY A 12-MEMBER COMMISSION COMPOSED OF THREE PRIVATE-PRACTICE LAWYERS, ONE UNIVERSITY PROFESSOR, ONE NOTARY, TWO PERMANENT COUNSELS AND FIVE LAYMEN.

LEGAL AID IS ADMINISTERED REGIONALLY BY CORPORATIONS ONLY A THIRD OF THE MEMBERS OF WHICH (ALL APPOINTED BY THE COMMISSION) BELONG TO THE LEGAL PROFESSION. IT IS THESE CORPORATIONS THAT OPEN OFFICES (THERE ARE 140), HIRE PERMANENT COUNSEL (360) AND STAFF (450). IN BRIEF, THEY ARE THE ONES THAT MANAGE THE REGIONAL BUDGET.

THIS PREJUDICE IN FAVOUR OF THE CLIENTELE MEANS THAT THE CLIENT CAN CHOOSE HIS LAWYER. HE MAY DEMAND A SALARIED, STAFF LAWYER WHO WORKS EXCLUSIVELY FOR LEGAL AID OR A PRIVATE-PRACTICE LAWYER PAID A FEE NEGOTIATED BETWEEN THE BAR ASSOCIATION AND THE MINISTER OF JUSTICE.

THIS FOCUS ON THE CLIENTELE ALSO CAUSED STAFF LAWYERS TO SPECIALIZE IN WHAT HAS COME TO BE CALLED "POVERTY LAW". FROM THE OUTSET, FREQUENT, EXCLUSIVE CONTACT WITH THE DISADVANTAGED CLIENTELE MADE US AWARE THAT THE DAILY LIFE OF THE POOR PERTAINED TO A FIELD OF LAW THAT HAD UP TO THEN BEEN IGNORED IN PRACTICE. THE POOR LIVE OFF VARIOUS SOCIAL INSURANCE PLANS SET UP BY ACTS AND REGULATIONS DESIGNED TO HELP THEM, WHETHER IT BE SOCIAL ASSISTANCE, UNEMPLOYMENT INSURANCE, WORKMEN'S COMPENSATION, THE AUTOMOBILE INSURANCE PLAN, THE PENSION PLAN, OR JUVENILE COURT. IN ORDER TO MEET THESE NEEDS, THE COMMISSION HAD TO TRAIN THE LAWYERS. THE PRACTICAL CONSEQUENCE OF THE DEVELOPMENT OF THIS NEW FIELD OF PRACTICE, WHICH WAS WIDELY PUBLICIZED, HAS NOT BEEN TO BURY THE ADMINISTRATIVE COURTS UNDER A FLOOD OF CASES. PEOPLE ARE NOT INCLINED TO APPEAL A CIVIL SERVANT'S DECISION IF THEIR LAWYER TELLS THEM THAT THEY HAVE BEEN GIVEN WHAT THEY WERE ENTITLED TO UNDER THE LAW. ON THE OTHER HAND, AWARE OF THE POTENTIAL PRESENCE OF A LEGAL-AID LAWYER BEHIND THE INDIVIDUAL FACING THEM, CIVIL SERVANTS HAVE BEEN POLICING THEMSELVES. AS TO THE OTHERS, WHO HAVE NOT SEEN FIT TO BE MORE RESPECTFUL OF REGULATIONS, PRESSURE BY LEGAL AID HAS OCCASIONALLY HASTENED THEIR REPLACEMENT...

THIS SPECIALIZATION IN POVERTY LAW, TOGETHER WITH AN ENORMOUS DAILY PRACTICE WITH DECISION-MAKING BODIES, HAS CAUSED THE COMMISSION TO APPEAR REGULARLY (4 TO 5 TIMES A YEAR) BEFORE THE PARLIAMENTARY COMMISSIONS OF THE NATIONAL ASSEMBLY, WHENEVER IT WAS PROPOSED TO AMEND ACTS OF DIRECT CONCERN TO OUR CLIENTELE. OUR PARTICIPATION LED TO MAJOR AMENDMENTS TO THE PROPOSED BILLS, SO THAT OUR OPINION IS BEING SOLICITED MUCH LIKE THAT OF THE BAR ASSOCIATION, AND EVEN MORE SO IN SOME AREAS WITH WHICH WE ARE MORE FAMILIAR.

THIS PUBLICIZED COMMITMENT TO POVERTY LAW MAY EXPLAIN IN PART THE FACT THAT QUEBEC LEGAL AID CONSTITUTES OVER ONE-HALF (1/2) OF ALL CIVIL CASES IN CANADA AS A WHOLE.

EACH STAFF LAWYER FILE IN ADMINISTRATIVE MATTERS ONLY COSTS, ON AVERAGE, \$270. WHY? BECAUSE STAFF LAWYERS ARE SPECIALIZED AND DO VOLUME WORK.

THIS FIELD OF LAW DOES NOT ATTRACT PRIVATE-PRACTICE LAWYERS BECAUSE THEY DO NOT KNOW IT AND BECAUSE THE TIME INVESTMENT REQUIRED TO KNOW IT IS DISPROPORTIONATE RELATIVE TO THE BENEFITS, UNLESS ONE IS ASSURED OF A SATISFACTORY CASELOAD.

AS SOON AS THERE WAS MORE THAN ONE LAWYER PER OFFICE, LEGAL AID FOSTERED SPECIALIZATION. FOR INSTANCE, IN MONTREAL, THERE IS A 35-LAWYER OFFICE THAT ONLY PRACTICES CRIMINAL LAW, 10 OF THEM ONLY PRACTICING BEFORE THE MUNICIPAL COURT. STILL IN MONTREAL, 13 LAWYERS ONLY DO JUVENILE LAW.

WHEN THE STAFF LAWYER IS ALONE OR WHEN THE LIMITED NUMBER OF CLIENTS IN A FIELD DOES NOT ALLOW HIM TO SPECIALIZE, HIS COMPETENCE IS KEPT UP TO DATE BY 4 ANNUAL TRAINING DAYS, A BIMONTHLY JURISPRUDENCE REPORT, PUBLICATIONS THAT WE ARE ALONE TO PRODUCE, AND ABOVE ALL, BY A RESEARCH SERVICE COMPOSED OF LAWYERS. THAT SERVICE IS NEVER ANY FURTHER THAN THE NEAREST PHONE.

WITH 260,000 CLIENTS ANNUALLY, THERE IS NO LACK OF VOLUME.

IN THE MORE TRADITIONAL FIELDS OF LAW FOR THE LEGAL AID CLIENTELE, AND I MEAN MATRIMONIAL AND CRIMINAL LAW, THE LARGE CASELOAD AND SPECIALIZATION ALONE DO NOT EXPLAIN THE LOW COSTS. ONE MUST ALSO ADD COMPETITION.

IN MATRIMONIAL AND CRIMINAL CASES, SPECIALIZATION FAVOURS BOTH PRIVATE-PRACTICE AND STAFF LAWYERS.

AS TO THE VOLUME, SOME SPECIALIZED PRIVATE-PRACTICE LAWYERS HAVE A CLIENTELE EVERY BIT AS LARGE AS THE STAFF LAWYERS.

IN CRIMINAL AND MATRIMONIAL LAW, WHICH CONSTITUTE TWO-THIRDS OF THE CASES SUBMITTED TO LEGAL AID, THE TAXPAYER BENEFITS FROM THE EFFECT OF COMPETITION.

LET ME EXPLAIN.

IN QUEBEC, IN ALL FIELDS OF LAW, THE LEGAL AID CLIENT IS ENTITLED TO THE LAWYER OF HIS CHOICE. THE LAW HAS PLACED THE STAFF LAWYERS IN COMPETITION WITH THE PRIVATE PRACTITIONERS. BOTH TYPES OF LAWYERS ARE INTERESTED IN KEEPING THE CLIENT.

THE STAFF LAWYER WHO HAS NO CLIENTS IS NO LONGER JUSTIFYING HIS PRESENCE. THAT LAWYER IS SUBJECTED TO AN ANNUAL REVIEW AND PART OF HIS SALARY INCREASE IS BASED ON HIS PERFORMANCE.

AS TO THE PRIVATE PRACTITIONER, HIS OBLIGATION TO PAY FOR HIS OFFICE AND TO PROVIDE FOR HIS FAMILY IS SUFFICIENT MOTIVATION.

THE CANADIAN EXPERIENCE IS THAT, IN A MIXED SYSTEM, PRIVATE-PRACTICE RATES ARE LOWER THAN IN A SITUATION WHERE PRIVATE PRACTITIONERS HAVE A TOTAL MONOPOLY OR A MONOPOLY IN CERTAIN AREAS OF LAW.

THE REASON IS SIMPLE. THE NEGOTIATOR HIRED BY THE STATE TO NEGOTIATE RATES WITH THE PROFESSION HAS AT HIS DISPOSAL A CONTROL SECTOR, SO HE IS NOT AT THE MERCY OF THE DATA PROVIDED TO HIM BY THE PROFESSION.

LET ME ILLUSTRATE THIS WITH AN EXAMPLE. WHEN CRIMINAL LAW RATES WERE BEING REVIEWED, THE BAR ASSOCIATION HAD SUBMITTED AVERAGE TIMES REQUIRED TO ACCOMPLISH EACH TYPE OF PROCEEDING, APPEARANCE, PRELIMINARY INQUIRY, LAWSUIT, ETC., AFTER SURVEYING ITS MEMBERS. THIS WAS DONE IN ORDER TO PROVE THAT FEES BASED ON THIS TYPE OF PROCEDURE IN FACT AMOUNTED TO AN ALMOST RIDICULOUSLY LOW HOURLY RATE. THE MINISTRY NEGOTIATOR THEN ASKED US TO PROVIDE HIM WITH TWO TYPES OF DATA. THE FIRST ONE WAS THE ANNUAL BILLINGS OF THE HIGHEST-PERFORMANCE PRIVATE PRACTITIONERS, TAKING INTO ACCOUNT THE AVERAGE TIMES SUBMITTED BY THE BAR ASSOCIATION. YOU WILL HAVE NO DIFFICULTY GUESSING THE RESULT: THE BEST-PERFORMING LAWYER, WHO WAS, INCIDENTALLY, SITTING AT THE BARGAINING TABLE, WOULD HAVE HAD TO DEVOTE 20 HOURS A DAY, 365 DAYS A YEAR TO HIS LEGAL AID CLIENTS ALONE, NOT EVEN COUNTING HIS PAYING CLIENTS, IF ONE WERE TO APPLY THOSE AVERAGE TIMES.

LAWYERS CAN BE PRETTY QUICK... THE SECOND TYPE OF DATA PROVIDED TO THE NEGOTIATOR INVOLVED THE AVERAGE TIME DEVOTED BY STAFF LAWYERS TO THE SAME PROCEDURES. SINCE MOST LAWYERS FILL OUT TIME SHEETS, THE COMPUTER GAVE US AVERAGE TIMES ONE-HALF THOSE PROVIDED BY THE BAR ASSOCIATION.

ONCE THESE DATA WERE PROVIDED, THE RATES WERE QUICKLY SETTLED.

IT IS ALSO TRUE THAT IN A MIXED SYSTEM THE RATE IS TOO LOW IF TOO MANY PRACTITIONERS REFUSE TO TAKE ON CASES. AT THE PRESENT, THE GOVERNMENT IS BENEFITING FROM THE FACT THAT THERE ARE TOO MANY LAWYERS AND THAT THEY ARE STARVING. THERE IS UNDER SUCH CIRCUMSTANCES A STRONG TEMPTATION FOR LAWYERS TO REDUCE QUALITY. IT IS THE CLIENT WHO SUFFERS THE CONSEQUENCES, AND HE IS OFTEN UNAWARE OF THE PREJUDICE

SUFFERED, SINCE HE IS RELATIVELY UNABLE TO ASSESS THE PROFESSIONAL SERVICES RENDERED.

IN QUEBEC, THE CLIENTELE AND THE TAXPAYER BOTH BENEFIT FROM THE MIXED SYSTEM. MORE CLIENTS CAN BE SERVED USING THE SAME FINANCIAL RESOURCES.

THE PROVINCE CAN PARTIALLY CONTROL ITS PRIVATE-SECTOR COSTS BY USING A RATE SCHEDULE. HOWEVER, WE ALWAYS FACE A SO-CALLED "OPEN" BUDGET. WE DO NOT KNOW IN ADVANCE THE NUMBER OF CLIENTS OR THEIR CHOICE OF LAWYER. OUR EXPERIENCE SHOWS THAT, EVEN IN SUCH A CONTEXT, IT IS POSSIBLE TO PREDICT THE COSTS. ONLY A LENGTHY, SUDDEN ECONOMIC CRISIS COULD UNDERMINE THOSE FORECASTS, BUT THAT WOULD ALSO BE THE CASE IN A MULTITUDE OF OTHER SECTORS.

THIS RELATIVE PREDICTABILITY IS DUE TO THE FACT THAT A MAJOR PORTION OF THE CASES IS COMPLETED BY STAFF LAWYERS. THIS COMPONENT OF THE SYSTEM ACTS AS A SHOCK ABSORBER WITH RESPECT TO THE LESS PREDICTABLE SITUATIONS. ASIDE FROM THE FACT THAT, FOR SOME TIME AND WITH THE SAME RESOURCES, THESE LAWYERS CAN ABSORB MORE CLIENTS, THE ADDITION OF NEW STAFF LAWYERS ALSO CONSTITUTES A PREDICTABLE EXPENSE.

THE TECHNOCRATS' CONCERN OVER AN "OPEN" BUDGET WHEN RESOURCES ARE NECESSARILY LIMITED IS JUSTIFIED IF WE DO NOT KNOW WHETHER EVERYONE WHO WANTS TO AVAIL HIMSELF OF LEGAL AID IS AWARE OF ITS EXISTENCE AND ACCESSIBILITY. I BELIEVE THAT THIS IS WHY MOST PROVINCIAL GOVERNMENTS HAVE REFUSED TO MAKE LEGAL AID A RIGHT.

IT IS OUR EXPERIENCE THAT EVEN IF LEGAL AID IS A RIGHT FOR THE POOR, THIS SOCIAL BENEFIT CAN BE KEPT WITHIN REASONABLE FINANCIAL LIMITS. IN CONSTANT DOLLARS, THE QUEBEC LEGAL AID BUDGET WAS THE SAME SINCE 1980-81 UNTIL 1986-87: OVER THE SAME PERIOD, THE CLIENTELE GRADUALLY INCREASED FROM 251,000 TO 272,000 INDIVIDUALS.

SINCE SURVEYS SHOWED THAT 90% OF THE POPULATION WAS AWARE OF THE EXISTENCE OF LEGAL AID, THE PROVINCE CAN CONTROL ITS COSTS USING EITHER THE ECONOMIC ELIGIBILITY TRESHOLDS OR THE EXTENT OF COVERAGE OF THE SYSTEM. FAILURE TO INDEX THE ELIGIBILITY TRESHOLDS REDUCES THE ELIGIBLE CLIENTELE.

THIS IS THE SITUATION EVOLVING IN QUEBEC. LEGAL AID WILL SOON ONLY BE ACCESSIBLE FOR RECIPIENTS OF SOCIAL ASSISTANCE. IN PRINCIPLE, INDIVIDUALS EARNING THE MINIMUM WAGE, OLDER COUPLES RECEIVING THE OLD-AGE SUPPLEMENT AND MANY UNEMPLOYED ARE NO LONGER ELIGIBLE. EVEN RECIPIENTS OF SOCIAL ASSISTANCE WHO ARE PAID A SUPPLEMENT TO ENCOURAGE THEIR RETURN TO THE JOB MARKET ARE NO LONGER ELIGIBLE.

SINCE WE BELIEVE, AND THAT IS MY LAST POINT, THAT THE BUDGET ALLOCATIONS WILL BE AVAILABLE IF DEMANDS ARE REASONABLE, JUSTIFIED AND CONSIDERED TO BE A PRIORITY BY THE PEOPLE, WE ARE CONFIDENT THAT THE PEOPLE WHOM LEGAL AID WAS DESIGNED TO HELP WHEN IT WAS SET UP WILL STILL BE ABLE TO USE IT.

HOW ARE WE GOING TO GO ABOUT IT?

LEGISLATORS GAVE THE COMMISSION OF WHICH I AM CHAIRMAN THE MANDATE TO DEAL WITH THE LEGAL INTERESTS OF DISADVANTAGED PERSONS. THE COMMISSION IS AN INDEPENDENT CORPORATION AND ITS MEMBERS AND EMPLOYEES ARE NOT PART OF THE CIVIL SERVICE.

SEVERAL TIMES IN THE PAST, THE COMMISSION HAS MADE THE MINISTER OF JUSTICE AWARE OF THE SUBJECT. THE ANNUAL REPORT OF THE COMMISSION SUBMITTED TO THE HOUSE INSISTED REPEATEDLY ON THAT IMBALANCE.

THREE WEEKS AGO, AT THE TIME OF THE PROFESSIONAL DAYS OF THE LAWYERS IN THE SYSTEM, A PRESS CONFERENCE WAS HELD BY THE COMMISSION. A STUDY DOCUMENT WAS DISTRIBUTED SHOWING THE INSUFFICIENCY OF THE STANDARD RELATIVE TO THE OBJECTIVES ORIGINALLY SET BY THE ACT, THE VARIOUS

INCREASE OPTIONS, THE GROUPS CONCERNED BY THE SCENARIOS (WOMEN, SINGLE-PARENT FAMILIES, OLD PEOPLE, LOW-WAGE EARNERS, UNEMPLOYED) AND THE COSTS PERTAINING TO EACH OPTION, TAKING CARE TO POINT OUT THAT THE COST TO THE PROVINCE WOULD BE THE SAME AS IN 1981, IN CONSTANT DOLLARS, EVEN WITH THE DESIRED RAISING OF THE STANDARD, BECAUSE, SINCE THEN, THE FEDERAL GOVERNMENT HAS BEEN SHARING THE COST OF CIVIL CASES.

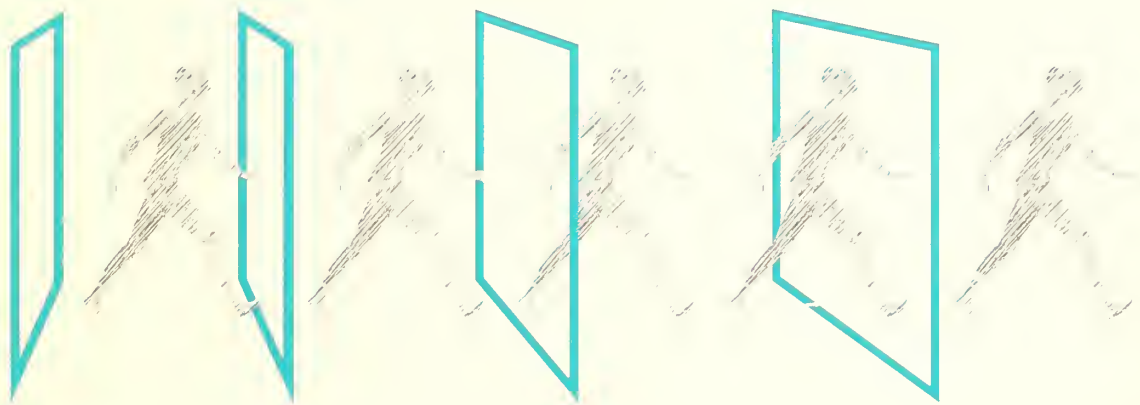
IT IS NOW UP TO THE REGIONAL CORPORATIONS AND THE STAFF LAWYERS TO "SPREAD THE WORD". THE 132 MEMBERS OF THE REGIONAL CORPORATIONS COME FROM DIFFERENT WALKS OF LIFE AND ORGANIZATIONS. MOST OF THEM ARE ACTIVE IN THEIR LOCAL COMMUNITY. IN ADDITION TO THEIR REGULAR WORKLOAD, STAFF LAWYERS ARE INVOLVED IN MOST OF THE ORGANIZATIONS THAT DEAL WITH OUR CLIENTELE. THEY COULD UNDOUBTEDLY MAKE MANY PEOPLE AWARE OF THE PROBLEM.

WE BELIEVE THAT THE LOGJAM IS LIKELY TO BE BROKEN BECAUSE OUR ARGUMENTS AND OUR FIGURES ARE RELIABLE. ABOVE ALL, WE BELIEVE THAT OUR HIGH MEDIA PROFILE, THE LARGE NUMBER OF SATISFIED CLIENTS (NEARLY 90%), THE TRUST THE PUBLIC HAS IN LEGAL AID (GREATER THAN THAT SHOWN TO THE POLICE, THE LAWYERS, CROWN ATTORNEYS AND EVEN THE MAGISTRATES, ACCORDING TO A MAY 1988 SURVEY BY "LE DEVOIR"), ALL THESE POSITIVE FACTORS WILL PERSUADE OUR ELECTED REPRESENTATIVES THAT CATCHING UP AS FAR AS FINANCIAL ELIGIBILITY STANDARDS ARE CONCERNED IS ONE OF THE PRIORITIES OF A SOCIETY THAT CLAIMS TO BE GOVERNED BY THE RULE OF LAW.

THE NEXT STEP WILL BE TO TAKE CARE OF THE MIDDLE CLASS.

THANK YOU.





Conference on Access to Civil Justice Program

June 20-22, 1988 Toronto



Ministry of
the Attorney
General

Ian Scott
Minister



It's a pleasure to welcome you to the Conference on Access to Civil Justice.

To my knowledge, this is the first time politicians, lawyers, judges, interest groups and other concerned individuals have met together to consider the critical issues we will address over the next few days.

Ensuring everyone is able to have a dispute resolved fairly is crucial to the credibility of our justice system.

I promise you that your concerns, thoughts and recommendations will be carefully studied by Ontario and, I suspect, by other jurisdictions in Canada and elsewhere.

I encourage you to speak up at every opportunity. Only through your participation will we ensure the success of our time together.

A handwritten signature in dark ink, appearing to read 'Ian Scott'. The signature is fluid and cursive, with a long horizontal stroke at the end.

The Honourable Ian Scott
Attorney General of Ontario

Plenary

9:00—9:30 am

KEYNOTE ADDRESS

The Honourable Ian Scott
Attorney General of Ontario

9:30—12:45 pm

CONFRONTING THE PROBLEM: Its Scope and Dimensions

A critical examination of how the civil justice system works, current thinking on key issues, and the challenges ahead. Part One evaluates a major research study commissioned for the conference that measures access to civil justice in Ontario. Part Two assesses civil justice systems elsewhere in the world.

9:30—11:00 am

Part One: Surveying the Problem

Moderator: *Allan Hutchinson*, Osgoode Hall Law School, Toronto

- *Charles Belleau*, Université d'Ottawa, Faculté de droit (civil)
- *Viateur Bergeron*, Université d'Ottawa, Faculté de droit (civil)
- *Harvey Bliss*, President, Canadian Bar Association—Ontario
- *W.A. Bogart*, Faculty of Law, University of Windsor
- *Mary Jane Mossman*, Osgoode Hall Law School, Toronto
- *Neil Vidmar*, Faculty of Law, University of Western Ontario

11:00—11:15 am

Coffee Break

11:15—12:45 pm

Part Two: Making Comparisons

Moderator: *Allan Hutchinson*, Osgoode Hall Law School, Toronto

- *Konstanze Plett*, Research Associate, Zentrum Fur Europäische Rechtspolitik an der Universität Bremen (ZERP)
- *Iain Ramsay*, Faculty of Law, University of Newcastle-upon-Tyne, England
- *David Trubek*, Institute for Legal Studies, University of Wisconsin, U.S.

12:45—2:00 pm

Lunch

Plenary

2:00–3:15 pm

BARRIERS TO ACCESS: Including the Excluded

An examination of the barriers that inhibit the full participation of everyone in the civil justice system, with a focus on traditionally excluded groups and individuals. How can we make the system more accessible?

Moderator: *The Honourable Brian Smith*, Attorney General of British Columbia

- *Havi Echenberg*, Executive Director, National Anti-Poverty Organization, Ottawa
- *Wilson Head*, President, Urban Alliance on Race Relations, Toronto
- *Andrew Roman*, Public Interest Advocacy Centre, Toronto
- *Sam Stevens*, Director, Native Law Program, Faculty of Law, University of British Columbia

3:15–3:30 pm

Coffee Break

Concurrent Workshops

3:30—6:00 pm

BARRIERS TO ACCESS

Nine concurrent workshops that address specific barriers to access to civil justice and examine strategies for reform.

1. The Minority Voice

How are minority voices denied expression in the legal process?

- *Raj Anand*, Chief Commissioner, Ontario Human Rights Commission
- *Eilert Frerichs*, Chaplain, University of Toronto
- *Judith Wahl*, Executive Director, Advocacy Centre for the Elderly, Toronto

2. Gender

How responsive is the legal system to the circumstances and concerns of women?

- *Denise Bellamy*, Counsel, Ontario Ministry of the Attorney General
- *Kathleen Mahoney*, Faculty of Law, University of Calgary
- *Helena Orton*, Litigation Director, Women's Legal Education and Action Fund (LEAF)

3. Literacy and Legal Language

How does sophisticated and technical legal language exclude many individuals and groups from the legal system?

- *John Benesh*, Executive Director, Canadian Law Information Council, Ottawa
- *Hon. James Horsman*, Attorney General, Alberta
- *Jack Pearpoint*, President, Frontier College, Ontario

4. Procedural Barriers

How do procedural rules obstruct or facilitate access to justice?

- *Michael Blazer*, Community Legal Worker & Law Reform Director, Metro Toronto Tenants Legal Services
- *Thomas A. Cromwell*, Dalhousie Law School
- *Justice Horace Krever*, Ontario Court of Appeal; Canadian Institute for the Administration of Justice

Concurrent Workshops

5. Native and Remote Justice

Civil justice has long been directed to the interests of people in large urban centres: how can those of native people and remote rural populations be better represented?

- *Hon. Roger S. Kimmerley*, Minister of Justice, Yukon
- *Sylvia Maracle*, Executive Director, Native Friendship Centres, Toronto
- *Graydon Nicholas*, President, Union of New Brunswick Indians

6. Public Legal Education

How can public education promote better understanding, greater participation and reform of the civil justice system?

- *Rick Haliechuk*, Legal Affairs reporter, Toronto Star
- *Taivi Lobu*, Executive Director, Community Legal Education – Ontario
- *Alison Manzer*, Canadian Bar Association – Ontario
- *Thomas Tidey*, Education Officer, Ontario Ministry of Education

7. Physical and Mental Disabilities

What are the particular obstacles – attitudinal and practical – faced by disabled persons dealing with the civil justice system?

- *David Baker*, Executive Director, Advocacy Resource Centre for the Handicapped (ARCH), Toronto
- *Orville Endicott*, Legal Counsel, Canadian Association for Community Living
- *Catherine McPherson*, Provincial Coordinator, Persons United for Self-Help – Ontario

8. Language and Rights

How do linguistic barriers affect the exercise of rights in a multicultural milieu?

- *Michel Bastarache*, Lang, Michener, Lash, Johnston, Toronto
- *Anne Ladouceur*, Conseil des organismes francophones du Toronto métropolitain, Centre francophone
- *Paulina Macuilis*, Outreach Worker, Ontario Coalition of Agencies Serving Immigrants
- *Gary Yee*, Executive Director, Metro Toronto Chinese and Southeast Asian Legal Clinic

Concurrent Workshops

9. Intervenor Status and Funding

To what degree should intervention in legal claims of parties not directly in dispute be encouraged and funded?

- *Mary Lou Fassel*, Justice Committee, National Action Committee on the Status of Women
- *Gérard Lévesque*, Chairman, Language Committee, Court Challenge Program, Ottawa
- *David Poch*, Counsel and Researcher, Energy Probe

6:00—7:00 pm

Reception

7:00—8:30 pm

Conference Dinner

8:30—10:00 pm

Informal Session with Attorneys General

Plenary

9:00—9:30 am

REPORT ON DAY ONE WORKSHOPS

9:30—10:15 am

THE COST OF JUSTICE: Making the Scales Balance

How do economic factors affect access to civil justice? An evaluation of costs and ways of achieving equity in the system.

Moderator: *Rosalie Abella*, Chair, Ontario Labour Relations Board

- *Richard Gathercole*, The B.C. Public Interest Advocacy Centre
- *Yves Lafontaine*, President, Commission des services juridiques, Montreal
- *Frederick Zemans*, Osgoode Hall Law School, Toronto

10:15—10:30 am

Coffee Break

Concurrent Workshops

10:30—12:15 pm

THE COST OF JUSTICE

Nine concurrent workshops focusing on economic issues and options for change.

1. Zuber and Beyond

An examination of the Report of the Ontario Courts Inquiry by T.G. Zuber, and the debate generated by its findings.

- *Craig Perkins*, Deputy Director, Policy Development Division, Ontario Ministry of the Attorney General
- *Hon. Brian Smith*, Attorney General, British Columbia
- *Janet Wilson*, Bastedo, Cooper, Toronto

2. Poverty Lawyering

What kind of legal access and assistance are needed to help the poor?

- *David Draper*, Staff Lawyer — Family Group, Parkdale Community Legal Services, Toronto
- *Terry Hunter*, Clinic Director, Simcoe Legal Services Clinic, Orillia
- *Sri Guggan Sri-skanda-rajah*, Jane Finch Community Legal Services, Inc., Toronto

3. Lawyers' Fees

An evaluation of legal fees and the scope for realistic regulation.

- *Marilyn Anderson*, Star Probe, The Toronto Star
- *Ian Binnie*, McCarthy & McCarthy, Toronto
- *Robert Pritchard*, Faculty of Law, University of Toronto

4. Paralegals

To what extent should non-lawyers be allowed to provide legal advice and services?

- *Eileen Gillese*, Faculty of Law, University of Western Ontario
- *John D. Ground*, The Law Society of Upper Canada
- *Brian Lawrie*, President, POINTTS Ltd., Toronto

5. Legal Aid

Evaluating the provision of legal aid: its extent, focus, and delivery.

- *Georges Goyer*, Chair, National Legal Aid Committee, Canadian Bar Association, Vancouver
- *Fran Kiteley*, Ontario Legal Aid Plan
- *Gregory Walen*, Singer, Beckie, Windels and Walen, Saskatoon

Concurrent Workshops

6. Legal Insurance

A look at pre-paid insurance schemes as a means of coping with high legal fees.

- *Stephen Ginsberg*, Director, Canadian Auto Workers Legal Services Plan
- *Jane Harvey*, Jane Harvey Associates, Toronto
- *Diana Majury*, Faculty of Law, University of Western Ontario; Osgoode Hall Law School, Toronto
- *Garth Manning*, Canadian Bar Association – Ontario

7. Contingency Fees

The rationale and the controversies behind contingency fee arrangements.

- *J. Barrie Marshall*, Milner & Steer, Calgary; Canadian Bar Association Council
- *Harvey T. Strosberg*, Gignac, Sutts, Windsor
- *Michael Trebilcock*, Faculty of Law, University of Toronto

8. Middle Class Difficulties

Between the rich and the poor, are the middle-class neglected by the legal system?

- *Glen Bell*, General Counsel, Public Interest Advocacy Centre, Ottawa
- *Margaret Cowtan*, Executive Director, Calgary Legal Guidance
- *Ruth Robinson*, President, Consumers' Association of Canada, Saskatoon

9. Community Clinics

What should the precise role and function of community clinics be?

- *Thomas G. Bastedo*, Bastedo, Cooper, Toronto
- *Shelley Gavigan*, Academic Director, Parkdale Community Legal Services, Toronto
- *Steven Shrybman*, Counsel, Canadian Environmental Law Association

Plenary

12:15—2:00 pm

Lunch

The Honourable Robert Andrew, Attorney General of Saskatchewan

2:00—3:15 pm

TRANSFORMATIONS IN JUSTICE: Exploring the Alternatives

Will increased access to the courts alone solve the problem? An evaluation of alternatives within different conflict-resolution and rights-vindication situations.

Moderator: *Richard Chaloner*, Deputy Attorney General, Ontario

- *Harry Arthurs*, President, York University
- *Jacques Chamberland*, Sous-ministre de la justice du Québec
- *Sally Engle Merry*, Wellesley College, MA., U.S.
- *Stephen Owen*, Ombudsman of British Columbia

3:15—3:30 pm

Coffee Break

Concurrent Workshops

3:30—5:00 pm

TRANSFORMATIONS IN JUSTICE

Eight concurrent workshops that explore alternatives to the courts and the experiences of other provinces and countries.

1. Access to Appointments

Evaluating the process of appointing decision-makers in the system. How can the public participate in that process?

- *Noel R. Bates*, Barrister & Solicitor, Burlington
- *Carol Tator*, Private Consultant, Equal Opportunity Consultants, Toronto
- *Jacob Ziegel*, Faculty of Law, University of Toronto

2. Neighbourhood and Lay Justice

How do we achieve greater involvement of ordinary citizens in the legal system to settle disputes at a local level?

- *Shin Imai*, Iler Campbell and Associates, Toronto
- *Michael Melling*, Chairman, Metro Toronto Tenants Association
- *Ernest Tannis*, Director, Canadian Institute for Conflict Resolution, Ottawa

3. Privatization

A survey of privately-operated, dispute-resolving schemes aimed at relieving the overworked legal process.

- *Malcolm Kronby*, Family Arbitration Service; McMillan Binch, Toronto
- *Iain Ramsay*, Faculty of Law, University of Newcastle-upon-Tyne, England
- *David Stockwood*, Stockwood, Blair, Spies and Ashby, Toronto

4. Mediation

A look at new mediation and negotiation-based approaches utilized by disputants.

- *Lee Ferrier*, Osler, Hoskin & Harcourt, Toronto
- *Glenn Sigurdson*, Taylor, Brazzell, McCaffrey, Winnipeg
- *Richard Thomas*, Director of Consumer Affairs, Office of Fair Trading, London, U.K.

Concurrent Workshops

5. Arbitration

Arbitration as a means of informal dispute-resolution and its effectiveness in new areas of disputing.

- *Michel Picher*, Arbitrator and Mediator, Adjudication Services Ltd., Toronto
- *Wesley Rayner*, Faculty of Law, University of Western Ontario
- *Raymond Tremblay*, Direction générale des Affaires législatives, Ministère de la Justice, Québec

6. Native Courts

Examining the need for native courts that respond to culture-specific concerns.

- *Carol Montagnes*, Ontario Native Council on Justice
- *Grand Chief Joseph Norton*, Mohawk Council of Kahnawake, Quebec
- *Sam Stevens*, Director, Native Law Program, Faculty of Law, University of British Columbia

7. Administrative Tribunals

An evaluation of administrative tribunals—their efficacy and responsiveness to popular concerns.

- *Suzanne Comtois*, Faculté de droit, Université de Sherbrooke
- *Jack Johnson*, Assistant Deputy Minister, Civil Law Division, Ontario Ministry of the Attorney General
- *Robert W. Macaulay*, Chairman, Ontario Energy Board

8. Group Claims/Collective Rights

With growing numbers of legal claims initiated by groups, how can collective rights be better recognized?

- *Kevin Doucette*, Policy Researcher, Consumers' Association of Canada
- *Jacques Dufour*, Fonds d'aide aux recours collectifs, Montréal
- *Margaret McNee*, McMillan Binch, Toronto
- *Basil Stapleton*, Director of Law Reform, Office of the Attorney General, New Brunswick

Plenary

9:00—9:45 am

REPORT ON DAY TWO WORKSHOPS

9:45—11:30 am

THE CHALLENGE AHEAD: From Ideas to Action

A review of major themes and proposals discussed during the conference. Perspectives on an agenda for change and transforming ideas into action.

Moderator: *The Honourable Ian Scott*, Attorney General of Ontario

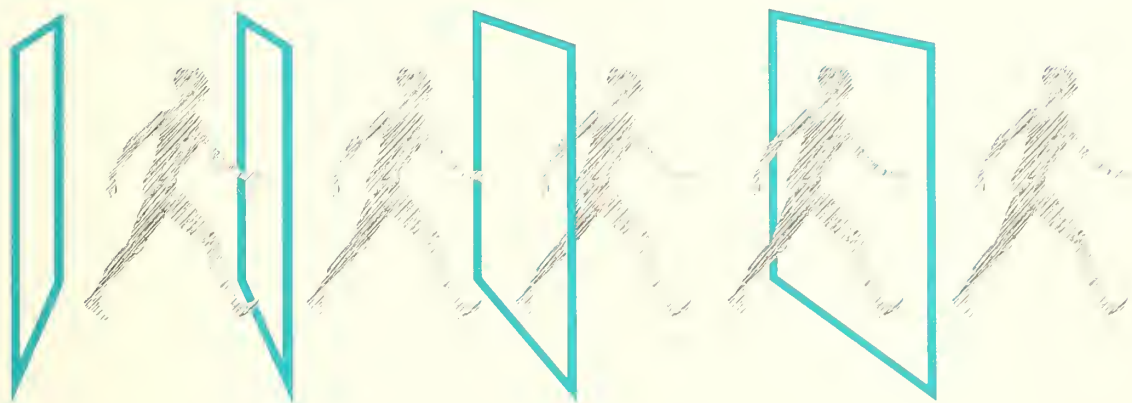
- *Jean Bazin*, President, Canadian Bar Association
- *Thomas Berger*, Lawyer, British Columbia
- *June Callwood*, National Columnist
- *David Trubek*, Institute for Legal Studies, University of Wisconsin, U.S.

Conference Chair:

Allan Hutchinson,
Osgoode Hall Law School

Conference Coordinator:

Lorraine Graham
Ontario Ministry of the Attorney General



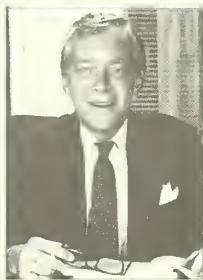
Congrès sur l'accès à la justice civile Programme

20-22 juin 1988 Toronto



Ministère
du Procureur
général

Ian Scott
Ministre



Je suis très heureux de vous accueillir au Congrès sur l'accès à la justice civile.

À ce qu'il paraît, cette rencontre est la première du genre où politiciens, avocats, juges, groupes d'intérêt et autres intéressés examineront les sujets d'importance capitale inscrits au programme des prochains jours.

La crédibilité de notre système de justice tient essentiellement à la garantie du règlement des litiges d'une façon équitable pour tous.

Je puis vous assurer que vos réflexions, vos préoccupations et vos recommandations feront l'objet d'études sérieuses en Ontario et ailleurs au Canada.

Saisissez chaque occasion pour exprimer votre point de vue. C'est votre participation active qui assurera la réussite de cet événement.

Procureur général de l'Ontario

L'honorable Ian Scott

Plénière

9 h 00—9 h 30

ALLOCUTION D'OUVERTURE

L'honorable Ian Scott
Procureur général de l'Ontario

9 h 30—12 h 45

NATURE DU PROBLÈME: Son étendue et ses dimensions

Examen critique du fonctionnement du système de justice civile, les courants de pensée actuels sur les points importants, les défis posés. La première partie est consacrée à un projet de recherche qui a été commandé pour la conférence dans le but d'évaluer l'accès à la justice civile en Ontario tandis que la deuxième partie s'adresse aux systèmes de justice civile étrangers.

9 h 30—11 h 00

Première partie: Analyse du problème

Modérateur: *Allan Hutchinson*, Faculté de droit Osgoode Hall, Toronto

- *Charles Belleau*, Université d'Ottawa, Faculté de droit (civil)
- *Viateur Bergeron*, Université d'Ottawa, Faculté de droit (civil)
- *Harvey Bliss*, Président, Association du Barreau canadien—Ontario
- *W.A. Bogart*, Faculté de droit, Université de Windsor
- *Mary Jane Mossman*, Faculté de droit Osgoode Hall, Toronto
- *Neil Vidmar*, Faculté de droit, Université Western Ontario

11 h 00—11 h 15

Pause

11 h 15—12 h 45

Deuxième partie: Comparaison de quelques systèmes

Modérateur: *Allan Hutchinson*, Faculté de droit Osgoode Hall, Toronto

- *Konstanze Plett*, Adjoint de recherches, Zentrum Fur Europäische Rechtspolitik an der Universität Bremen (ZERP)
- *Iain Ramsay*, Faculté de droit, University of Newcastle-upon-Tyne, England
- *David Trubek*, Institute for Legal Studies, University of Wisconsin, U.S.

12 h 45—14 h 00

Déjeuner

Plénière

14 h 00—15 h 15

OBSTACLES À L'ACCÈS: Vers une participation universelle

Cette séance traitera des obstacles à la pleine participation de tous les citoyens dans le système de justice civile, en mettant l'accent sur les groupes et personnes traditionnellement exclus. Comment rendre le système plus accessible?

Modérateur: *Hon. Brian Smith*, Procureur général de la Colombie-Britannique

- *Havi Echenberg*, Directeur, Organisation nationale d'anti-pauvreté, Ottawa
- *Wilson Head*, Président, Urban Alliance on Race Relations, Toronto
- *Andrew Roman*, Centre pour la défense de l'intérêt public, Toronto
- *Sam Stevens*, Directeur, Programme sur les droits des autochtones, Faculté de droit, Université de la Colombie-Britannique

15 h 15—15 h 30

Pause

Ateliers simultanés

15 h 30—18 h 00

OBSTACLES À L'ACCÈS

Neuf ateliers tenus simultanément traiteront des obstacles à la justice civile et examineront des solutions.

1. La voix de la minorité

Le processus judiciaire permet-il aux groupes minoritaires de s'exprimer pleinement?

- *Raj Anand*, Premier commissaire, Commission ontarienne des droits de la personne
- *Eilert Frerichs*, Aumônier, Université de Toronto
- *Judith Wahl*, Directrice, Advocacy Centre for the Elderly, Toronto

2. Droit et sexisme

Le système judiciaire répond-il aux besoins des femmes?

- *Denise Bellamy*, Conseillère, Ministère du Procureur général de l'Ontario
- *Kathleen Mahoney*, Faculté de droit, Université de Calgary
- *Helena Orton*, Directrice du contentieux, Women's Legal Education and Action Fund (LEAF)

3. Problèmes reliés à la langue du droit

La technicité du langage juridique prive-t-elle certains groupes ou personnes de l'accès à la justice?

- *John Benesh*, Directeur, Centre canadien d'information juridique, Ottawa
- *Hon. James Horsman*, Procureur général, Alberta
- *Jack Pearpoint*, Président, Frontier College, Ontario

4. Obstacles de procédure

Comment les règles de procédure peuvent-elles entraver ou faciliter l'accès à la justice?

- *Michael Blazer*, Travailleur juridique communautaire et Directeur de la réforme du droit, Metro Toronto Tenants Legal Services
- *Thomas A. Cromwell*, École de droit, Dalhousie
- *Hon. Juge Horace Krever*, Cour d'appel de l'Ontario; Institut canadien de l'administration de la justice

Ateliers simultanés

5. L'accès à la justice pour les autochtones et dans les régions éloignées

La justice civile a toujours d'abord servi les intérêts des habitants des grands centres urbains. Comment pourrait-on mieux représenter les autochtones et les populations rurales isolées?

- *Hon. Roger Kimmerley*, Ministre de la Justice, Yukon
- *Sylvia Maracle*, Directrice, Native Friendship Centres, Toronto
- *Graydon Nicholas*, Président, Union of New Brunswick Indians

6. Vulgarisation et information juridiques

Comment l'information juridique destinée au public peut-elle faire connaître le système de justice civile, améliorer la participation et favoriser les réformes?

- *Rick Haliechuk*, Chroniqueur judiciaire, Toronto Star
- *Taivi Lobu*, Directrice, Information juridique communautaire de l'Ontario
- *Alison Manzer*, Association du Barreau canadien—Ontario
- *Thomas Tidey*, Agent d'éducation, Ministère de l'éducation, Ontario

7. Handicaps physiques et mentaux

L'handicap éprouve-t-il des problèmes pratiques ou d'attitude particuliers dans ses rapports avec le système de justice civile?

- *David Baker*, Directeur, Advocacy Resource Centre for the Handicapped, Toronto
- *Orville Endicott*, Conseiller juridique, Canadian Association for Community Living
- *Catherine McPherson*, Persons United for Self-Help—Ontario

8. Multilinguisme et exercice de droits

Quels sont les effets de la barrière linguistique sur l'exercice de droits dans un contexte multiculturel?

- *Michel Bastarache*, Lang, Michener, Lash, Johnston, Toronto
- *Anne Ladouceur*, Conseil des organismes francophones du Toronto métropolitain, Centre francophone
- *Paulina Macuilis*, Outreach Worker, Ontario Coalition of Agencies Serving Immigrants
- *Gary Yee*, Directeur, Metro Toronto Chinese and Southeast Asian Legal Clinic

Ateliers simultanés

9. Intervention en justice et financement

Jusqu'à quel point faut-il encourager et financer l'intervention en cour de tiers dont les droits ne sont pas directement en litige?

- *Mary Lou Fassel*, Comité canadien d'action sur le statut de la femme
- *Gérard Lévesque*, Président, Comité linguistique, Programme de contestation judiciaire, Vanier
- *David Poch*, Conseiller juridique et chercheur, Enquête énergétique

18 h 00–19 h 00

Réception

19 h 00–20 h 30

Dîner du congrès

20 h 30–22 h 00

Rencontre informelle avec les procureurs généraux

Plénière

9 h 00—9 h 30

RAPPORT SUR LES ATELIERS DE LA PREMIÈRE JOURNÉE

9 h 30—10 h 15

LE COÛT DE LA JUSTICE: Équilibrer la balance de la justice

De quelle façon les facteurs économiques influent-ils sur l'accès à la justice civile? Un examen des coûts et des moyens propres à assurer un système équitable.

Modérateur: *Rosalie Abella*, Présidente, Commission des relations de travail de l'Ontario

- *Richard Gathercole*, Centre pour la défense de l'intérêt public, Colombie-Britannique
- *Yves Lafontaine*, Président, Commission des services juridiques, Montréal
- *Frederick Zemans*, Faculté de droit Osgoode Hall, Toronto

10 h 15—10 h 30

Pause

Ateliers simultanés

10 h 30—12 h 15

LES COÛTS DE LA JUSTICE

Neuf ateliers tenus simultanément sur les questions économiques et les propositions de changement.

1. Au-delà du rapport Zuber

Examen du rapport d'enquête sur les tribunaux de l'Ontario par T.G. Zuber et du débat que soulèvent ses recommandations.

- *Craig Perkins*, Directeur adjoint, Division de l'élaboration des politiques, Ministère du Procureur général de l'Ontario
- *Hon. Brian Smith*, Procureur général, Colombie-Britannique
- *Janet Wilson*, Bastedo, Cooper, Toronto

2. Droit social

Quel genre d'aide et d'accès à la justice faut-il fournir aux défavorisés?

- *David Draper*, Parkdale Community Legal Services
- *Terry Hunter*, Directeur, Simcoe Legal Services Clinic
- *Sri Guggan Sri-skanda-rajah*, Jane Finch Community Legal Services, Inc.

3. Les honoraires d'avocat

Examen des frais juridiques et la portée d'un contrôle réaliste.

- *Marilyn Anderson*, Star Probe, The Toronto Star
- *Ian Binnie*, McCarthy & McCarthy, Toronto
- *Robert Pritchard*, Faculté de droit, Université de Toronto

4. Les travailleurs parajuridiques

Dans quelle mesure doit-on permettre aux non juristes d'offrir des conseils et des services de nature juridique?

- *Eileen Gillese*, Faculté de droit, Université Western Ontario
- *John D. Ground*, Société du Barreau du Haut-Canada
- *Brian Lawrie*, Président, POINTTS Ltd.

5. L'aide juridique

Évaluation de l'aide juridique: étendue et prestation du service.

- *Georges Goyer*, Président, Comité national sur l'aide juridique, Association du Barreau canadien, Vancouver
- *Fran Kiteley*, Régime d'aide juridique de l'Ontario
- *Gregory Walen*, Singer, Beckie, Windels and Walen, Saskatoon

Ateliers simultanés

6. Assurance juridique

Un aperçu des régimes d'assurance de services juridiques prépayés comme moyens de faire face aux frais juridiques élevés

- *Stephen Ginsberg*, Directeur, Canadian Auto Workers Legal Services Plan
- *Jane Harvey*, Jane Harvey Associates, Toronto
- *Diana Majury*, Faculté de droit, Université Western Ontario; Faculté de droit Osgoode Hall, Toronto
- *Garth Manning*, Association du Barreau canadien—Ontario

7. Honoraires conditionnels

Le fondement de ces arrangements et les controverses qu'ils suscitent.

- *J. Barrie Marshall*, Milner & Steer, Calgary; Conseil de l'Association du Barreau canadien
- *Harvey T. Strosberg*, Gignac, Sutts, Windsor
- *Michael Trebilcock*, Faculté de droit, Université de Toronto

8. Les difficultés de la classe moyenne

Coincée entre les riches et les pauvres, la classe moyenne est-elle laissée pour compte?

- *Glen Bell*, Avocat-conseil, Centre pour la défense de l'intérêt public, Ottawa
- *Margaret Cowtan*, Directrice, Calgary Legal Guidance
- *Ruth Robinson*, Présidente, Association des consommateurs du Canada, Saskatoon

9. Les cliniques communautaires

Quels devraient être précisément le rôle et les fonctions des cliniques communautaires?

- *Thomas G. Bastedo*, Bastedo, Cooper, Toronto
- *Shelley Gavigan*, Directrice de l'éducation, Parkdale Community Legal Services, Toronto
- *Steven Shrybman*, L'Association canadienne du droit de l'environnement

Plénière

12 h 15—14 h 00

Déjeuner

L'honorable Robert Andrew, Procureur général de la Saskatchewan

14 h 00—15 h 15

LA JUSTICE EN MUTATION: Les solutions de rechange

L'augmentation des possibilités d'accès aux tribunaux résoud-elle le problème? Examen de solutions de rechange dans diverses situations de règlement des litiges et de défense des droits.

Modérateur: *Richard Chaloner*, Sous-procureur général de l'Ontario

- *Harry Arthurs*, Président, Université York
- *Jacques Chamberland*, Sous-ministre de la justice du Québec
- *Sally Engle Merry*, Wellesley College, Mass., U.S.A.
- *Stephen Owen*, Ombudsman de la Colombie-Britannique

15 h 15—15 h 30

Pause

Ateliers simultanés

15 h 30—17 h 00

LES TRANSFORMATIONS AU SEIN DE LA JUSTICE

Huit ateliers simultanés examineront les solutions de rechange aux tribunaux et les expériences tentées dans d'autres provinces et à l'étranger.

1. Accès aux nominations judiciaires

Évaluation du processus de nomination. Le public peut-il y participer?

- *Noel R. Bates*, Avocat, Burlington
- *Carol Tator*, Consultant, Equal Opportunity Consultants, Toronto
- *Jacob Ziegel*, Faculté de droit, Université de Toronto

2. Justice populaire

Comment augmenter le niveau de participation des gens ordinaires dans le système juridique pour résoudre les litiges au niveau local?

- *Shin Imai*, Avocat, Iler Campbell and Associates, Toronto
- *Michael Melling*, Président, Metro Toronto Tenants Association
- *Ernest Tannis*, Directeur, Canadian Institute for Conflict Resolution, Ottawa

3. Privatisation

Une étude des régimes privés de solution des litiges visant à décongestionner l'appareil judiciaire.

- *Malcolm Kronby*, Family Arbitration Service; McMillan Binch, Toronto
- *Iain Ramsay*, Faculté de droit, University of Newcastle-upon-Tyne, England
- *David Stockwood*, Stockwood, Blair, Spies and Ashby, Toronto

4. Médiation

Un regard sur les nouvelles techniques faisant appel à la médiation et à la négociation.

- *Lee Ferrier*, Osler, Hoskin & Harcourt, Toronto
- *Glenn Sigurdson*, Taylor, Brazzell, McCaffrey, Winnipeg
- *Richard Thomas*, Director of Consumer Affairs, Office of Fair Trading, London, U.K.

Ateliers simultanés

5. Arbitrage

L'arbitrage comme mode de solution informelle des litiges, son efficacité.

- *Michel Picher*, Arbitre et médiateur, Adjudication Services Ltd., Toronto
- *Wesley Rayner*, Faculté de droit, Université Western Ontario
- *Raymond Tremblay*, Direction générale des Affaires législatives, Ministère de la Justice, Québec

6. Tribunaux autochtones

Examen de cette institution qui répond à des besoins culturels.

- *Carol Montagnes*, Ontario Native Council on Justice
- *Grand Chef Joseph Norton*, Conseil Mohawk de Kahnawake, Québec
- *Sam Stevens*, Directeur, Programme sur les droits des autochtones, Faculté de droit, Université de la Colombie-Britannique

7. Tribunaux administratifs

Évaluation de leur efficacité: répondent-ils aux attentes du public?

- *Suzanne Comtois*, Faculté de droit, Université de Sherbrooke
- *Jack Johnson*, Sous-procureur général adjoint, Division du droit civil, Ministère du Procureur général de l'Ontario
- *Robert W. Macaulay*, Président, Commission de l'énergie de l'Ontario

8. Recours collectifs/Droits collectifs

Le nombre croissant des recours collectifs favorisera-t-il la reconnaissance des droits collectifs?

- *Kevin Doucette*, Recherche — politiques, Association des consommateurs du Canada, Ottawa
- *Jacques Dufour*, Fonds d'aide aux recours collectifs, Montréal
- *Margaret McNee*, McMillan Binch, Toronto
- *Basil Stapleton*, Directeur, Direction de la réforme du droit, Bureau du Procureur général du Nouveau-Brunswick

Plénière

9 h 00—9 h 45

RAPPORT SUR LES ATELIERS DE LA DEUXIÈME JOURNÉE

9 h 45—11 h 30

LE DÉFI À RELEVER: Passer aux actes

Revue des thèmes principaux et des propositions qui ont fait l'objet des discussions. Échange d'idées sur des projets de changement et sur la façon de mettre les idées en œuvre.

Modérateur: *L'honorable Ian Scott*, Procureur général de l'Ontario

- *Jean Bazin*, Président, Association du Barreau canadien
- *Thomas Berger*, Avocat, Colombie-Britannique
- *June Callwood*, Chroniqueur national
- *David Trubek*, Institute for Legal Studies, University of Wisconsin

Président du congrès:

Allan Hutchinson

Faculté de droit Osgoode Hall, Toronto

Coordinatrice du congrès:

Lorraine Graham

Ministère du Procureur général de l'Ontario



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CONFERENCE ON ACCESS TO CIVIL JUSTICE

EVALUATION OF CONFERENCE

It would be appreciated if you would take a few minutes to complete the following questionnaire to assist the Ministry in evaluating the effectiveness of the conference.

1. Overall conference evaluation

	Poor	Fair	Good	Excellent
* Program topics	_____	_____	_____	_____
* Choice of speakers	_____	_____	_____	_____
* Organization	_____	_____	_____	_____

Comments: _____

2. What aspects of the conference were of most value to you?

3. What sessions interested you most?

* Plenaries:

Confronting the Problem	_____
Barriers to Access	_____
The Cost of Justice	_____
Transformations in Justice	_____
The Challenge Ahead	_____

Informal session with Attorneys General _____

*** Workshops**

The Minority Voice _____
Gender _____
Literacy and Legal Language _____
Procedural Barriers _____
Native and Remote Justice _____
Public Legal Education _____
Physical and Mental Disabilities _____
Language and Rights _____
Intervenor Status and Funding _____
Zuber and Beyond _____
Poverty Lawyering _____
Lawyers' Fees _____
Paralegals _____
Legal Aid _____
Legal Insurance _____
Contingency Fees _____
Middle Class Difficulties _____
Community Clinics _____
Access to Appointments _____
Neighbourhood and Lay Justice _____
Privatization _____
Mediation _____
Arbitration _____
Native Courts _____
Administrative Tribunals _____
Group Claims/Collective Rights _____

4. What kind of follow-up to the conference would you find useful?

Publication of a report on the conference _____
Follow-up conference _____
Other suggestions _____

5. What further initiatives would you like to see the Ministry take in the area of access to civil justice?

Please place your completed questionnaire in the box provided at the Registration/Information Booth, or mail to:

Lorraine Graham,
Ministry of the Attorney General,
18 King Street East,
Toronto, M5C 1C5

